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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

vs.

FRED ARMBURG

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS

PETITION FOR CERTIORARI FILED OCTOBER 20, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,291)

( )

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[fols. 1 & 2] COMMONWEALTH OF MASSACHUSETTS:

IN MUNICIPAL COURT OF CITY OF BOSTON

JUDGMENT

At the Municipal Court of the City of Boston, holden at said Boston, within the County of Suffolk, for civil business, on the first day of March, A. D. 1930.

FRED ARMBURG, Plaintiff,

vs.

BOSTON AND MAINE RAILROAD, Defendant

the Plaintiff appears and enters his action in the words following, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To the sheriffs of our several counties or their deputies or any constable of any city or town within our said Commonwealth, Greeting:

We command you to attach the goods or estate of Boston and Maine Railroad, a corporation duly established under the laws of the Commonwealth of Massachusetts and having its usual place of business in Boston, in our County of Suffolk, to the value of Sixty Thousand Dollars; and summon the said Defendant (if it may be found in your precinct,) to appear before our Justices of the Municipal Court of the City of Boston, to be holden at Boston, within our County of Suffolk, for civil business, on Saturday, the first day of March, A. D. 1930, at nine of the clock in the forenoon; then and there to answer to Fred Armburg, of Acton, in the County of Middlesex, in an action of tort, to the damage of the said Plaintiff (as he says) the sum of Sixty Thousand Dollars, as shall then and there appear, with other due damages. And have you there this Writ with your doings therein.

[L. s.]

Witness, Wilfred Bolster, Esquire, at Boston aforesaid, the Tenth day of February, in the year of our Lord one thousand nine hundred and thirty.

William F. Donovan, Clerk.

[fols. 3 & 4] Upon which is the following, to wit:

Officer's Return

"MIDDLESEX, ss:

February 14, A. D. 1930.

By virtue of this writ, I this day attached a chip as the property of the within-named defendant corporation, Boston and Maine Railroad, and summoned it to appear and answer at Court by giving an attested copy, together with a summons, of this writ in hand to C. N. Marland, its treasurer, and the officer in charge of its business.

Fees:

Copy	.50
Service	1.00
Travel	.30
	$1.80

Chester M. Ricker, Deputy Sheriff."

And the further consideration of said action is thence adjourned to the fourth day of March, A. D., 1930. And on said fourth day of March, said defendant files its Answer.

And the further consideration if said action is thence continued or adjourned from time to time until the ninth day of April, A. D. 1930.

And on the ninth, tenth and eleventh day of said April Trial.

Defendant files request for rulings, and action was continued for advisement, Zottoli, J., and on April 14, A. D. 1930, Court finds for plaintiff in $26,500—Memo. of rulings filed.

April 16, A. D. 1930, Defendant files request for report.

April 18, A. D. 1930, Defendant files Draft Report.

May 3, A. D. 1930, Report filed and allowed.

May 26, A. D. 1930, Arguments on report before the Appellate Division. Decision reserved.

June 27, A. D. 1930, Opinion and final order of Appellate Division filed. Report dismissed.

July 1, A. D. 1930, Defendant files Claim of Appeal to Supreme Judicial Court.

July 3, A. D. 1930, Defendant files request that record be prepared for the transmission of appeal.

July 3, 1930, costs of preparing record for transmission of appeal estimated at $125, and notice thereof sent to Defendant.

July 8, 1930, Defendant deposits $125 to perfect appeal.

July 28, 1930, Defendant notified as to readiness of papers for entry in Supreme Judicial Court.

July 29, 1930, Copies, etc., delivered to defendant for entry in Supreme Judicial Court.

September 15, 1931, Rescript received from Supreme Judicial Court, order dismissing report affir-ed.

September 16, 1931, Agreement to continue one week for Judgment filed.

September 22, 1931, Defendant files motion for stay of execution.

It is therefore considered by said Court, that he the said Plaintiff recover against the said Defendant for the sum of twenty-eight thousand eight hundred and one dollars and one cent damage, and costs of suit, taxed at ninety-two dollars and forty cents.

Judg't date: Sept. 25, 1931.

Dam.	$28,801.01
Costs	92.40
	$28,893.41

Attest:

William F. Donovan, Clerk.

A true copy.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Municipal Court of the City of Boston, at Boston, the twenty-fifth day of September, in the year of our Lord one thousand nine hundred and thirty-one.

William F. Donovan, Clerk. (Seal The Municipal Court of the City of Boston.)

[fol. 5] IN MUNICIPAL COURT OF THE CITY OF BOSTON

FRED ARMBURG

v.

BOSTON AND MAINE RAILROAD

Report—Filed May 3, 1930

STATEMENT OF CASE

This is an action of tort at common law brought by a writ dated February 10, 1930 in which the plaintiff seeks to recover damages for injuries sustained by him on July 8, 1929, while he was traveling in the course of his employment by the defendant as a section hand upon a railroad motor car which was being operated over the tracks of the Boston and Maine Railroad in the Town of Acton by another employee of the defendant named Connell.

The defendant's answer is a general denial and, in addition to setting up the defences of contributory negligence and assumption of risk on the part of the plaintiff, sets up the defence that the plaintiff's injuries were due solely to the negligence of a fellow servant.

The pleadings may be referred to and are hereby made a part of this report.

At the trial the defendant contended that the Massachusetts Workmen's Compensation Act, G. L. c. 152, did not apply to the defendant which at the time of the accident was, and is now, a railroad corporation engaged in both intra- and inter-state commerce; that G. L. c. 152, § 66 was not applicable to the defendant and that the defence that the plaintiff's injury was caused by the negligence of a fellow servant was open to the defendant in this action and constituted a complete defence thereto; and further, that if said Massachusetts Workmen's Compensation Act, G. L. c. 152, should be construed as being applicable to the defendant then said G. L. c. 152 § 66 would be unconstitu-
[fol. 6] tional on the ground that it violated the Commerce clause contained in Article I, Sect. 8 of the Constitution of the United States by imposing an undue burden upon interstate commerce.

Without admitting that it came within the provisions of that Act, it was admitted by the defendant corporation at the trial that it was not then and was not at the time of the plaintiff's injury a subscriber under the provisions of the Massachusetts Workmen's Compensation Act now contained in General Laws, c. 152.

It was admitted by the plaintiff, Armburg, at the trial that the defendant was at the time of the plaintiff's injury a common carrier of freight and passengers for hire; that it either owned or leased railroad tracks which it used in its business, which tracks extend from point to point within the state of Massachusetts, and also from points in Massachusetts to points in the states of Maine, New Hampshire, Vermont and New York; and that the defendant corporation was at the time of the plaintiff's injury engaged in the business of transporting both freight and passengers over its tracks from point to point within this state and also from points within this state to points in other states, and from points in other states to points in this state. It was also agreed at the trial between the parties that the plaintiff was not employed in interstate commerce at the time of his injury but was then engaged in intrastate commerce.

At the trial there was also evidence tending to show the following:

The accident happened at about 7:00 A. M. on the morning of July 8, 1929. The plaintiff, Armburg, was then employed by the Railroad as a section hand, and he and the other members of his section crew had reported for work at the section house at West Acton and at the time of the accident were being transported to their place of work at South Acton over the tracks of the defendant railroad on a railroad motor car which was being operated by another employee of the Railroad, Section Foreman Connell.

As the motor car was proceeding along the track at a speed of about 15 or 20 miles an hour, the motor car ran into a switch which had been set against it and was overturned, Armburg being thrown to the ground and severely injured.

A red signal at the switch stand was so set as to indicate that the switch was set against the motor car, but Connell did not pay any attention to this signal or heed the warning shouts of members of another section crew nearby.

The Court found as a fact that the cause of the injuries to the plaintiff was the negligence of Connell, the operator of the railroad motor car upon which the plaintiff was riding at the time of the accident, and also found and ruled [fol. 7] that Connell in operating the railroad motor car at the time of the accident was a fellow servant of the plaintiff. There was evidence to warrant these findings and this ruling.

There was no evidence to warrant a finding that the accident was due to any contractual assumption of risk on the part of the plaintiff and there was no evidence to warrant a finding that the plaintiff himself was not in the exercise of due care.

EDMUND S. COGSWELL, a witness called by the defendant, testified on direct examination that he was employed by be Commonwealth of Massachusetts, in the insurance department, his position being Second Deputy Commissioner of Insurance.

Q. Your duties have to do with the supervision of workmen's compensation insurance?

A. Yes, sir, the rates, the rates for workmen's compensation.

Q. The rates for workmen's compensation?

A. Yes, sir.

Q. Is that the chief part of your duties?

A. No, I also have to assist the Commissioner in matters pertaining to automobile insurance rates, to looking after the approval of policy forms and to keeping a general oversight on the activities of fraternal societies.

Q. You also approve the policy forms of workmen's compensation?

A. Yes, sir.

Q. As well as the approving of the rates?

A. Yes, sir. I might say that the Commissioner passes on most of the rate changes if he is in the department at the time, but I recommend them to him for approval.

Q. They come to him, then, through you?

A. Yes, sir.

Q. And you are the official at the State House who deals with the insurance companies and their representative bodies in fixing the compensation rates?

A. Yes, sir.

* * * * * * *

Q. Mr. Cogswell, does your department in determining the rates to be charged under workmen's compensation insurance and the like have dealings with an organization known as the Massachusetts Rating & Inspection Bureau?

A. Yes, sir.

Q. Would you just tell us what the Massachusetts Rating & Inspection Bureau is?

A. It is a bureau composed of insurance companies writ- [fol. 8] ing workmen's compensation insurance in this state. The Commissioner or his representative attends the meetings of the bureau. Ordinarily rates come to the department for approval from the bureau, the bureau filing them on behalf of the companies writing workmen's compensation insurance in this state.

Q. So the ordinary course is for the proposed rates to come to your department, to be submitted to your department by this bureau, and then your department passes upon them and approves or disapproves them, as the case may be?

A. That is the ordinary course. The companies can file direct if they wish.

Q. But in either case your department approves or disapproves the rates as submitted to you?

A. Yes, sir.

Q. As I understand it, there is a book known as the Basic Rate Manual, which is made use of by your department and adopted at least in part? Is that so?

A. Manual of Workmen's Compensation Insurance. That has the approval of the Commissioner of Insurance.

* * * * * * *

Q. May I call your attention to page 10 of these printed rules? Will you tell me whether or not that page 10 bears any record upon it?

A. Yes, sir. It is the approval of the Insurance Department, approval stamp.

Q. This is page 10 of this Manual of Workmen's Compensation Insurance that we have just referred to?

A. Yes, sir.

The first three paragraphs of the pay roll rules for workmen's compensation insurance appearing on page 10 of said Manual and approved by Merton L. Brown, Commissioner

of Insurance for the Commonwealth of Massachusetts, under the provisions of Section 52 of Chapter 152 of the General Laws to be effective January 1, 1929, and in effect at the time of the accident to the plaintiff, Armburg, were then introduced in evidence and so far as here material, were as follows:

"Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance. Under no circumstances shall a Compensation Insurance policy be written covering any part of a specific location of a given risk, leaving another part of the same location uninsured. If a risk or a part of a risk is at a single specific location, such risk or such part of a risk shall be carried only by a single insurance carrier.

[fol. 9] The following specific rules shall govern the treatment of payroll as the basis of premium for Compensation Insurance policies:

1. Division of Payroll

(a) The term 'risk' as used in this Manual, shall mean and include the entire operations of one employer within a given state."

Roland B. Hogan, a witness called by the defendant, testified that he was employed by the Boston and Maine Railroad in the engineering department;

Q. Is that the civil engineering department?

A. Yes; they handle the railroad's engineering problems.

Q. Now, at my request have you brought here a blueprint showing the trackage of the Boston & Maine Railroad?

A. Yes, sir. A map of the Boston & Maine Railroad, yes, sir.

Q. And that map indicates the trackage, does it, of the railroad throughout the various states?

A. Yes, sir.

Q. Now, what states are indicated on that plan as containing trackage of the Boston & Maine Railroad?

A. The states of Maine, New Hampshire, Vermont, Massachusetts, and New York.

Mr. Rockwood: I offer this in evidence.

* * * * * * *

Q. Now, at my request have you determined the amount of main line trackage that the Boston & Maine Railroad has in Massachusetts?

A. Yes, sir.

Q. And what is that trackage?

A. The Boston & Maine Railroad has 729.37 miles of road in Massachusetts.

Q. And how much has it over its entire system?

A. At the present date?

Q. No, as of July 8, 1929, that is.

A. It had 2077.02 miles of road.

* * * * * * *

Q. That included not only the track located in Massachusetts but the track located in the other states?

A. In the other states.

Q. And the figure that you gave for trackage in Massachusetts, was that also as of July 8, 1929?

A. Yes, sir.

Q. That is, Mr. Hogan, there were about 1300 miles of track outside of Massachusetts on the Boston & Maine system and about 700 inside; is that so?

A. Well, the difference between those figures I gave you would give that.

* * * * * * *

[fol. 10] Cross-examination:

Q. Now, let us see. The Boston & Maine Railroad, the Massachusetts corporation, is the lessee of some railroad lines in this state which you have included in your totals, isn't it?

A. I think so.

Q. You don't know?

A. I could not say positively.

Q. So that you don't know whether these lines here, the road that you have spoken about,—you don't know whether

it is leased or owned by the railroad or whether it has any title to it at all or not, do you?

A. Well, the map that you have there is just——

Q. Do you know?

A. I could not say positively.

Q. Well, now, can you tell about the railroad which is known as the Fitchburg Railroad? That is a road running from Boston to Fitchburg, isn't it?

A. Yes, sir.

Q. That is a road operated and maintained by this defendant corporation, isn't it?

A. Yes, sir.

Q. And that is the road which runs through South Acton, West Acton and Boxborough?

A. Yes, sir.

Q. And that appears on this map as a road running from Boston to Fitchburg, doesn't it?

A. Yes, sir.

Q. Now, do you know whether or not that railroad is leased by the Boston & Maine, the Massachusetts corporation, and operated by it?

A. I can only say what I think.

Q. No, no, not what you think; do you know?

A. My understanding is that it is owned by the Boston & Maine.

Q. Do you know?

A. I don't believe I am qualified to answer questions like that.

Q. It is a railroad that begins at Boston and runs to Fitchburg?

A. Yes, sir.

Q. And that is the railroad on which this man was injured, beginning at Boston and running to Fitchburg?

Mr. Garland: If the witness knows. The Fitchburg Division?

Mr. Rowley: If the witness knows. It may be called a division.

Q. Supposing you do call it a division, it is what was formerly the Fitchburg Railroad, isn't it?

A. Yes, sir.

Q. And it has been taken over either by lease or purchase by the Boston & Maine Railroad, and is now operated by it?

A. Yes, sir.

[fol. 11] Q. And it begins at Boston and runs to Fitchburg?

A. Yes, sir.

Mr. Rowley: That is all——

Q. And that is all in the State of Massachusetts?

A. Yes, sir.

Redirect examination:

Q. The railroad that Mr. Rowley is referring to he says runs from Boston to Fitchburg? Does it run beyond Fitchburg?

A. Yes, sir, that is only one of the way stations.

* * * * * * *

Q. The railroad that runs from Boston to Fitchburg, whether you call it the Boston & Fitchburg or the Boston & Maine, continues beyond Fitchburg and runs out of the state, does it not?

A. Yes, sir; Fitchburg is not the end of the line.

Q. That is only a way station?

A. Yes, sir.

* * * * * * *

Recross-examination:

Q. It runs over a road which was formerly a part of the old Boston & Maine Railroad beyond there, doesn't it?

A. I didn't quite get your question.

Q. It runs over tracks which were formerly a part of the old Boston & Maine Railroad beyond Fitchburg, doesn't it?

A. Well——

Q. If you know? Have you ever been out there?

A. A very few times, yes, sir.

Q. Your work is making blueprints, and that kind of work in the office?

A. I am a draughtsman, yes, sir.

Q. You are a draughtsman brought up here to testify in regard to the trackage and so on? Where did you get your figures,—out of something that was told you or given you by somebody else? You never made them up, did you, yourself?

A. No, sir.

Q. And your work is that of a draughtsman? How long have you been a draughtsman there?

A. Been a draughtsman since 1916.

Q. And, so far as you know, this road runs from Boston to Fitchburg? That is known as a separate part, a separate division, isn't it?

A. Not from Boston to Fitchburg, no, sir.

Q. Well, isn't it?

A. The Fitchburg Division?

Mr. Garland: It never ended there.

[fol. 12] Q. Yes; that was owned by the Fitchburg Railroad, a separate corporation from this, wasn't it?

A. From Boston to Fitchburg was a separate corporation.

* * * * * * *

Q. Do you know whether the old Fitchburg Railroad was taken over by the Boston & Maine Railroad? Do you know?

A. I understand it was.

Q. Well, do you know?

A. I could not give you any date as to when it was or anything like that, but that is my understanding, that it was taken over by the Boston & Maine.

Q. You have no knowledge on it one way or the other, have you?

A. I could not tell you the detail.

* * * * * * *

Q. You have nothing to do with the titles of the trackage or the roads, have you?

A. No, my work has been draughting.

Mr. Rowley: That is all.

Mr. Rockwood: Now, I offer this map. May that be marked?

Mr. Rowley: That is an exhibit. I supposed you put it in.

The Court: It may be marked.

(The blueprint map of the Boston & Maine System is marked as Exhibit 8.)

IVAN B. DEARBORN, a witness called by the defendant, testified that he had been employed by the Boston and Maine Railroad in its Payroll Accounting Department for 18 years.

Q. Now, as a part of your duties in that department, have you had supervision over making monthly reports required by the Federal Interstate Commerce Commission?

A. Yes, sir.

Q. Now, are these copies of such reports (showing papers to the witness)?

A. Yes, sir.

Q. For the month of July, 1929?

A. For the month of July, 1929, similar to the one sent to Washington.

Q. That is a copy of the report sent to the Interstate Commerce Commission?

A. I do know it positively of my own personal knowledge,—at least, I know it was put in the mail.

The Witness: Perhaps a slight explanation of how this report is prepared would help at this time.

Q. Yes. Will you explain that?

A. A majority of those reports,—in fact, all of them, are taken direct from the payrolls from which the men are paid. [fol. 13] There are some seventy odd detailed reports; some of them are prepared at outside points, division headquarters, but over fifty of them are prepared right in the room where I work every day by different clerks in that room. They are all combined and compiled into one big statement, of which this is a true copy, being run off on a hectograph machine at the same time that the original was taken off going to Washington. There is no one figure on here giving the total compensation and the total number of men, but there are three figures which can be added together to give the total compensation and three other figures which can be added together to give the total number of men.

The Court: You mean the total payroll?

The Witness: The total payroll, the monthly payroll and compensation.

* * * * * * *

Q. This record here is kept in the usual course of business down at the Boston & Maine, is it not?

A. Yes, sir.

Q. And is compiled, as you say, from the payroll accounts of the various men?

A. Yes, sir.

Mr. Rowley: Not by this witness?

The Witness: Not in detail, no, sir, but entirely under my supervision.

. . . . . .

The Court: If I understand you, that is a duplicate original of a paper that the railroad sends through to the Interstate Commerce Commission?

The Witness: Yes, sir.

The Court: Showing the personnel of the road and the compensation paid?

The Witness: Yes, sir, divided into certain classes, as outlined by the Commission.

. . . . . .

Q. Now, won't you tell us the total number of employees and the total payroll for the month of July, 1929?

A. I have three figures here——

The Court: Tell us where you got them from.

The Witness: The first three sheets of this report cover all employees of the railroad except in the four branches of the train service, that is, engineers, firemen, conductors, and brakemen, and they are summarized at the bottom of the third sheet under this heading which says, "Total all groups (except train and engine)", the men paid on an hourly basis, and those paid on a daily basis, which would be, on a daily basis, 2208, and on an——

[fol. 14] Q. 2208 men?

The Court: How many?

The Witness: 2208 men on a daily basis; on an hourly basis, 15,778 men. Then the fourth sheet of this report covers all men in the four branches of train service,—train and engine service, the conductors, firemen, brakemen and the engineers, and they are all paid on an hourly basis, and the total number is 3,971. Those three figures added together give you the total number of employees for the month of July, 1929. They are all shown in the column

headed "2" on those sheets. The compensation is obtained in the same way, by taking the figures shown in column 3 of those same sheets. The compensation of the men paid on a daily basis is $411,001. The cents are dropped, either dropped or added as the case may be.

The Court: $411,000?

The Witness: $411,001. Now, for the men on an hourly basis the compensation is $1,921,971. In the train and engine service the compensation is $811,062, those three being added together give the total compensation for the month of July, 1929.

Q. That is, the total payroll?

A. The total payroll.

Mr. Rockwood: May this be marked your Honor, it being understood that this instruction contained on the back of the last page is not in?

The Court: Yes.

(The monthly report of employees, service and compensation, of the Boston & Maine Railroad, is marked as Exhibit 9.)

Cross-examination:

Q. Did you report the revenue also?

A. No, sir, not on that report.

. . . . . .

Q. So that you simply report——

A. The actual payroll.

Q. What you report is the number of employees in the middle of the month, isn't it?

A. Yes, on the 15th day.

Q. On the 15th day? So that this does not cover July 8th?

A. So far as that actual number of employees is concerned, it would not, no.

Q. It covers the middle of the month? And you report in here the time paid for? Where do you classify yourself?

A. Myself?

Q. Under what class do you classify yourself?

A. Myself in Class 10.

[fol. 15] Q. Class 10, Clerks, B?

A. Yes, sir.

Q. That is the one where the time paid for but not worked is 31,495?

A. Yes, sir, holidays and Saturday afternoons.

Q. Are you included in that?

A. My time for those periods, yes, sir. By the way, that figure you read was hours and not money.

Q. And what was the pay per hour?

A. It varies.

Q. For clerks? About?

A. I could not say the average pay. I have no personal recollection of that now.

Q. Now, I understand you did not make this up yourself, did you?

A. Not personally, no, sir.

Q. What is your position in the road?

A. I have charge of one branch of the payroll accounting.

Q. And what work do you do?

A. Supervision of the preparation of payrolls for the engineering and maintenance of way and car repair departments and supervision of that report there.

Q. Your exact work is making out the pay envelopes or the pay-checks? You pay by checks, don't you?

A. I have nothing to do with the preparation of pay-checks. Mine is entirely payrolls.

Q. Making up a list of the persons who are to get their checks?

A. Yes, sir.

Q. You make up their time?

A. The time is sent in from the outside, and we figure it.

Q. You do the figuring of that, do you?

A. Yes, sir.

* * * * * * * *

Q. Figuring payrolls, making up lists of the names and addresses of persons?

A. Yes, sir, that is one part of the work.

Q. You have no personal knowledge of the number of employees in the middle of the month, have you?

A. Except as they come in on these reports from which the payroll is prepared.

Q. And where they came from, or what they were you don't know? Who prepared them you don't know?

A. I have no personal knowledge of the men, but I know the names as they come in.

Q. There is nothing here to show who these employees are?.

A. Not by name, no, sir.

* * * * * * *

[fol. 16] Q. Anybody else direct the preparation of these except you?

A. Mr. Phillips and Mr. Mather are both in charge—are over me. Mr. Phillips is in charge of all payroll matters. I simply have one portion of them under me.

Q. I suppose after you made this out carefully and thoroughly you made oath to the truth of it, didn't you?

A. I don't sign it, no sir.

Q. You don't sign it?

A. No, sir, Mr. Mather has that.

Q. This is not a complete copy of the paper that was sent down there, is it? I notice this one looks as if it had been prepared to have A. T. Mather make oath that the annexed return was prepared under his direction.

A. It is.

Q. And it purports, although it is not signed, to have been subscribed and sworn to on September 7th, 1929. It was not prepared under your direction, but under Mr. Mather's, wasn't it?

A. Yes, I suppose you would say that, although the detail was——

Q. When were you first called up here to bring this up?

A. Yesterday morning.

* * * * * * *

Q. Who made that up in the first place? Who made it up, do you know?

A. Why, yes.

* * * * * * *

Q. You didn't make it up?

A. I didn't make up the detailed work, no. I said so in the first place.

PATRICK J. MULLANEY, a witness called by the defendant, testified that he was employed by the Boston and Maine Railroad as Assistant Freight Traffic Manager.

Q. Is there any freight traffic manager?

A. No, sir.

Q. Now, at my request did you obtain some records of the railroad showing the amount of freight carried on the railroad during the year 1929?

A. I did.

Q. And have you those records with you?

A. Yes, sir.

* * * * * * *

Q. Is this a record that is also required by the Interstate Commerce Commission?

A. It is. It is an annual report of freight commodity statistics to the Interstate Commerce Commission.

Q. Now, can you tell us the total tonnage of freight carried by the Boston & Maine Railroad from that report in [fol. 17] both intrastate and interstate commerce, inclusive?

A. During the year 1929 the railroad handled 23,922,566 tons, net tons of 2000 lbs.

* * * * * * *

Q. Now, have you any item there which shows how much freight was carried by the railroad in tons between points in the same state during that year?

A. No.

* * * * * * *

Q. Now, do you know how this paper here is compiled?

A. It is compiled in our accounting department.

Q. From the railroad's freight records?

A. Yes, sir.

Q. And it is compiled under four columns or classifications of freight; is that correct?

A. That is correct.

Q. And what are those four columns?

A. This has to do with revenue freight originating on the Boston & Maine Railroad and terminating on the Boston & Maine Railroad. That is one column. Freight originating on the Boston & Maine Railroad and delivered to other

railroads. That is another column. Freight received from other railroads and terminating on the Boston & Maine Railroad. That is the third column. Freight received from other carriers and delivered to other carriers. That is another column.

Q. That is, that fourth column means where the Boston & Maine Railroad comes in between two other carriers?

A. Yes, that is right.

Q. Carrying the freight along?

A. That is right.

* * * * * * *

The Court: As far as the records that are kept, I understand that that is a compilation from the records—from the freight records?

Mr. Rockwood: That is so, your Honor.

The Court: They are accurate?

Mr. Rockwood: Yes, sir.

The Court: If they are not accurate, we don't want them. That is the proposition.

Mr. Rockwood: Of course there is no reason for the Railroad's not turning out accurate records on these points.

The Court: Are these papers that are kept in the usual course of the Boston & Maine's business?

Mr. Garland: Yes, sir.

The Court: Compiled from their freight books?

Mr. Garland: Yes, sir.

[fol. 18] Q. That is so, isn't it?

A. They are, yes, sir.

The Court: At that time? Not something made now for the purposes of this case?

The Witness: Indeed not.

Mr. Rockwood: None of these records, your Honor, were made for this case. They were in existence before this case started.

Q. Can you give us the figure of the total amount of tonnage of the freight originating on and terminating on the Boston & Maine Railroad?

A. Approximately 15% of the total.

Q. Approximately 15% of the total tonnage?

A. Yes, sir.

* * * * * * *

Q. As I understand it, that 15% of the total tonnage covers all the freight carried on the railroad, the Boston & Maine Railroad, originating on and terminating on that railroad?

A. That is right.

Q. That is, only 15% of the business of the Boston & Maine Railroad's freight business does not involve the use of some other railroad in carrying the freight to and from its destination?

A. That is right.

The Court: Between points within the state, if I understand you correctly? In other words, this is intrastate?

Mr. Garland: That includes a little interstate also.

The Court: No, I didn't understand so. Let us make sure.

Mr. Rockwood: My question was not supposed to be founded on that, your Honor. Suppose there was a shipment starting from Boston on the Boston & Maine Railroad, and it was going to Concord, New Hampshire, still on the Boston & Maine Railroad. That would start on and terminate on the Boston & Maine Railroad, and it would come under this classification.

The Court: Then I misunderstood.

Mr. Garland: In other words, that includes also some interstate freight.

Mr. Rockwood: This includes some intrastate as well as interstate.

The Court: I understand now.

Q. Would there be any intrastate shipments covered by any of the other classifications?

A. It is possible, but they would be a very small percentage of the total.

Q. Could you explain that to us?

A. I can very easily explain it. A shipment from Salem, Mass., on the Boston & Maine, to Ashland, Mass., on the [fol. 19] Boston & Albany Railroad would be intrastate, but still would not be in the first column.

Q. That would come under what?

A. Originating on the Boston & Maine and delivered to another carrier.

Q. Now, do you know of your own knowledge how much that traffic might be?

Mr. Rowley: That I object to.

The Court: That means from observation, not from hearsay.

Mr. Rockwood: Yes, your Honor. That is what I am saying, of his own knowledge.

The Court: You may have that.

Q. I asked you whether you know of your own knowledge what proportion of the tonnage carried, the tonnage carried intrastate, over the Boston & Maine Railroad to any other connection carrier would amount to?

A. No, I don't. I could not answer that except the answer that I know it is a very small proportion.

Mr. Rowley: I ask that be stricken out.

The Court: He may answer that question Yes or No. I don't think that calls for an answer of how much. The question is whether you know from your own knowledge, first.

The Witness: Yes, sir.

The Court: It means, from his own personal observation.

Q. Now, of your own knowledge what would that proportion be?

A. Very, very small.

Q. Can you approximate it at all?

A. A very liberal approximation in my opinion would be 10% or under.

Q. 10% or under?

A. Yes, sir.

Q. Now, are you able to give us any idea as to freight which might be carried, say, from Ashland on the Boston & Albany to Salem on the Boston & Maine Railroad? What proportion would that be?

A. I included traffic in both directions in that other estimate.

Q. You included traffic in both directions? That is what I wanted to be sure of. And your other figures of 15% of the total tonnage as tonnage originating on and terminating on the Boston & Maine Railroad alone included, as you have already stated, not only intrastate shipments within Massachusetts but interstate shipments on the Boston & Maine Railroad from Massachusetts to other states on the Boston & Maine Railroad?

A. That is correct.

[fol. 20] Q. And also intrastate shipments within those other states on the Boston & Maine Railroad?

A. That is also correct.

* * * * * * *

Cross-examination:

Q. You did not keep these figures, did you?

A. No, sir.

* * * * * * *

Q. And you haven't any figures here to show the number of tons of freight of any kind which were shipped from one point in Massachusetts to any other point in Massachusetts, have you?

A. No, sir.

Q. Neither have you figures to show how much freight was shipped from one point in Massachusetts to a point in New Hampshire, or Maine, or New York, have you?

A. On the Boston & Maine Railroad?

Q. Yes.

A. They are shown in that statement.

Q. It does show here the number of tons shipped from—we will say from Lowell to Nashua?

A. No, that is not shown specifically.

Q. Not shown specifically? But freight which is shipped from Lowell to Nashua is included with the freight shipped from Lowell to Salem?

A. That is correct.

Q. So that there is nothing to show the freight which is shipped from Massachusetts to a point in another state except figures which include shipments from points in Massachusetts to other points in Massachusetts?

A. That is correct.

Q. Now, I think you gave us the figures as to the tonnage, twenty-three million tons of freight handled. You neglected to state the amount which the railroad received from the handling of that twenty-three million tons of freight? * * * Within the period that you stated here, how much did you get?

A. $52,749,586.

* * * * * * *

(The annual report of freight commodity statistics of the Boston & Maine Railroad to the Interstate Commerce Commission, consisting of five sheets, is marked as Exhibit 10.)

The blueprint map of the Boston and Maine system introduced in evidence as Exhibit 8, the monthly report of employees, service and compensation of the Boston and Maine Railroad on four sheets covering the month of July, 1929, and introduced in evidence as Exhibit 9, and the annual report for the year 1929 of freight commodity statistics of the Boston and Maine Railroad for the Interstate Com- [fol. 21] merce Commission consisting of five sheets and introduced in evidence as Exhibit 10, are each and all of them made a part of this report and may be referred to at the argument of this case but need not be copied or printed.

DEFENDANT'S REQUESTS FOR RULINGS

At the close of the trial and before the final arguments, the defendant duly made the following written requests for rulings:

1. Upon all the evidence the plaintiff is not entitled to recover.

2. Upon all the evidence and the pleadings the plaintiff is not entitled to recover.

3. There is no evidence to warrant the Court in finding that the defendant as distinguished from its servants and agents was negligent.

4. There is no evidence to warrant the Court in finding that any negligence on the part of the defendant as distinguished from its servants and agents was the proximate cause of the injury to the plaintiff.

5. There is no evidence to warrant the Court in finding that any employee or servant of the defendant was negligent.

6. There is no evidence to warrant the Court in finding that the negligence, if any, of any employee or servant of the defendant was a proximate cause of the accident.

7. The Workmen's Compensation Act, St. 1911, chap. 751, now General Laws, chap. 152, does not apply to a railroad corporation engaged in both intrastate and interstate commerce.

8. St. 1911, chap. 751, now General Laws, chap. 152, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

9. The defences of contributory negligence, assumption of risk, and that the injury was caused by the negligence of a fellow servant are open to the defendant in this action.

10. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

11. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

12. As a matter of law Connell was a fellow servant of the plaintiff.

[fol. 22] 13. As a matter of law upon all the evidence the employee who was operating the railroad motor car at the time of the accident was a fellow servant of the plaintiff Armburg.

14. Upon all the evidence the plaintiff is not entitled to recover in this action upon the following grounds and each of them:

(a) Because upon all the evidence the injury to the plaintiff was caused by the negligence of a fellow servant and the defence that the said injury was so caused is open to the defendant in this action as a matter of law and constitutes a complete defence thereto.

(b) Because as a matter of law upon all the evidence the plaintiff's injury was caused by the negligence of a fellow servant.

(c) Because as a matter of law the defence that the injury was caused by the negligence of a fellow servant is open to the defendant in this action.

(d) Because as a matter of law the Workmen's Compensation Act, St. 1911, chap. 751, now General Laws, chap. 152, does not apply to a railroad corporation engaged in both intrastate and interstate commerce.

(e) Because as a matter of law St. 1911, chap. 751, now General Laws, chap. 152, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

(f) Because as a matter of law the defendant, which is a railroad corporation engaged in both intra and interstate commerce, falls altogether outside the operation of the Workmen's Compensation Act, St. 1911, chap. 751, now G. L. c. 152.

(g) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

(h) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

MEMORANDUM ON REQUESTS FOR RULINGS

The Court filed a memorandum disposing of the defendant's said requests for rulings as follows:

1. Refused.

2. Refused.

[fol. 23] 3. Granted.—I find that the cause of the injuries to the plaintiff was the negligence of Connell, the operator of the Railroad motor car upon which the plaintiff was riding.

4. Granted.

5. to 11 (inclusive). Refused.

12. Granted.—I find that to be the fact, even if it were not so as a matter of law.

13. I find as a fact that "Connell" was the employee who was operating the Railroad motor car at the time of the accident, and that he then in so doing was a fellow servant of the plaintiff.

14. Refused.

As set forth in said memorandum, the Court found that the cause of the injuries to the plaintiff was the negligence of Connell, the operator of the railroad motor car upon which the plaintiff was riding, and both found as a fact and ruled as a matter of law that Connell in operating the railroad motor car at the time of the accident was so doing as a fellow servant of the plaintiff.

The Court found for the plaintiff and assessed the plaintiff's damages in the sum of $26,500.

This report contains all the evidence material to the questions reported.

The defendant claiming to be aggrieved by the refusals to rule as requested, namely, by the refusal of the Court to give the defendant's said requests for rulings numbered 1, 2, 5, 6, 7, 8, 9, 10, 11, 14 and each of them, I hereby report the same to the Appellate Division for determination.

Joseph T. Zottoli, Justice of the Municipal Court of the City of Boston.

Filed and allowed May 3, 1930.

In Municipal Court of City of Boston

Plaintiff's Declaration—Filed Mar. 1, 1930

And the plaintiff says that on or about July 8, 1929, at that part of Acton in the County of Middlesex called South Acton, he was lawfully travelling in and upon a motor car which was operated and propelled over the tracks of the Boston and Maine Railroad by the defendant, its agents and servants; that the plaintiff was in the exercise of due care; that by reason of the carelessness and negligence [fol. 24] of the defendant, its agents and servants, the motor car upon which the plaintiff was riding was derailed

and the plaintiff was thrown from said motor car and under said motor car, his neck was broken, his head was cut, his shoulder dislocated, his collar-bone broken, and he was otherwise seriously and permanently injured; that by reason of the carelessness and negligence of the defendant, its agents and servants, the plaintiff has been made to suffer great pain and anguish of body and mind, he has been put to great trouble and expense, his ability to work and support himself and family has been permanently impaired, and he has otherwise been seriously and permanently injured, all to his great damage.

Clarence W. Rowley, Plaintiff's Attorney.

IN MUNICIPAL COURT OF CITY OF BOSTON

DEFENDANT'S ANSWER—Filed Mar. 4, 1930

Now comes the defendant in the above entitled action and for answer denies each and every allegation in the plaintiff's writ and declaration contained.

And further answering the defendant says that if the plaintiff was injured as alleged in his declaration, which the defendant denies, said injuries were due in whole or in part to contributory negligence on the part of the plaintiff.

And further answering the defendant says that if the plaintiff was injured as alleged in his declaration, which the defendant denies, said injuries were due solely to the negligence of a fellow servant.

And further answering the defendant says that the plaintiff assumed the risk of the alleged accident.

By Its Attorneys, Hurlburt, Jones & Hall.

IN MUNICIPAL COURT OF CITY OF BOSTON

FINAL ORDER OF APPELLATE DIVISION

Ordered that the Clerk make the following entry under said case in the docket, viz:

Report dismissed.

By the Court.

William F. Donovan, Clerk.

June 27, 1930.

[fol. 25] IN MUNICIPAL COURT OF CITY OF BOSTON

DEFENDANT'S CLAIM OF APPEAL FROM FINAL DECISION OF THE APPELLATE DIVISION—Filed July 1, 1930

Now comes the defendant in the above entitled action and hereby appeals to the Supreme Judicial Court for the Commonwealth from the final decision of the Appellate Division entered on June 27, 1930 dismissing the report in said action.

By Its Attorneys, Hurlburt, Jones & Hall.

Copy. Attest:

Volney D. Caldwell, Ass't. Clerk.

[fol. 26] IN MUNICIPAL COURT OF THE CITY OF BOSTON FOR CIVIL BUSINESS, APPELLATE DIVISION

Bolster, C. J.; Dowd, J.; Adlow, J.

ARMBURG

v.

BOSTON & MAINE R. R.

(May 26-June 27, 1930)

OPINION—Filed June 27, 1930

Two questions only arise on this report, whether as a matter of statutory interpretation, the provisions of the Massachusetts Workmen's Compensation Act, G. L. Ch. 152, apply at all to a railroad corporation operating in both interstate and intrastate commerce, and whether, if that question be answered in the affirmative, the provision of section 66, shutting off in an action at law the defense that the injury was caused by the negligence of a fellow employee does not fall, in its application to such a corporation, because putting an undue burden on interstate commerce.

The act, in our opinion, leaves no room for doubt as to

the first question. Section one provides that "unless a different meaning is plainly required by the context"—(not by results)—"or specifically prescribed"—"employee" shall mean "every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer." The generality of the definition—"every person," coupled with the statement of a cognate exception, renders any judicial addition thereto, for utter exclusion, well-nigh impossible. [fol. 27] The practice frequently indulged so to read a statute that it shall not contravene constitutional requirements does not warrant the rejection or warping of plain language. And so far as the course of judicial decision is of moment, it indicates that this defendant is within the act.

Ashton v. B. & M. R. R., 222 Mass. 66.
Henshaw v. B. & M. R. R., 222 Mass. 459.
Lyford v. B. & M. R. R., 227 Mass. 10.

At the same time, it is plain that the language of the act is not to be so extensively applied as to give results that never could have been intended.

cf. Gould's case, 215 Mass. 480.
Zoulalian v. N. E. San. & Ben. Ass'n, 230 Mass. 102.

But what the scope of such inclusion may be is quite a different question. We are not, on this record, called upon to decide what the results might be, either as to employer or employee, in a case not wholly within the field of local control.

cf. Com. v. Potter, 254 Mass. 272, and cases cited.
Toland's Case, 258 Mass. 470.
Lynch v. B. & M. R. R., 227 Mass. 123.

This is a case purely of intrastate concern and regulation, and as to such matters we are clear that this defendant, remaining outside the compensation system by choice, does so on the conditions legislatively fixed. Its motives which led to that choice, based on an alleged difficulty in con-

forming its methods of doing business to the mechanism of the compensatory system, are immaterial. We have no doubt that there are other employers in our complex industrial life who have found the choice equally hard. Such matters are of legislative, not judicial, cognizance.

Neither do we see any ground for saying that the act puts an undue burden on interstate commerce. The necessary inclusion for insurance of all employees is assumed. That point is expressly left open at the court's own instance, in the main case touching the matter.

Cox's Case, 225 Mass. 220, 223.

We feel sure that the ultimate decision must be that the legislature never intended a clear present to insurers by quiring insurance upon those whose duties and risks were such that there could be no collection and the "Pay-Roll [fol. 28] Rules" appear to make such allowance.

"Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured *which is the subject of insurance.*" (Italics ours.) It is a purely gratuituous assumption on the part of the defendant that it cannot by proper proceedings compel the Commissioner to exclude non-collectible risks from the insurance, or that it cannot in like manner force the adjustment of premium rates upon the basis of real risks. The courts have not abdicated in favor of the Massachusetts Rating and Inspection Bureau.

All beyond this is the fact that the legislature has changed the common-law defence of negligence of a fellow-servant. It hardly needs argument that not even an interstate carrier has a vested right in such a rule, in its application to intrastate matters.

Young v. Duncan, 218 Mass. 346.
N. Y. Cent. R. R. v. White, 243 U. S. 188.
Hawkins v. Bleakly, 243 U. S. 210.

Report dismissed.

A true copy. Attest:

Volney D. Caldwell, Asst. Clerk.

[File endorsement omitted.]

[fol. 29] In Supreme Judicial Court of Massachusetts, at Boston, Sept. 10, 1931

Rescript—Filed in Municipal Court Sept. 15, 1931

In the Case of

Fred Armburg

vs.

Boston and Maine Railroad,

pending in the Municipal Court of the City of Boston for the County of Suffolk,

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Order dismissing report affirmed.

By the Court.

Walter F. Frederick, Clerk.

September 10, 1931.

A true copy. Attest:

Volney D. Caldwell, Asst. Clerk.

[fols. 30 & 31] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion, filed with the reporter of decisions, to which reference is made.

[fol. 32] [File endorsement omitted.]

[fol. 33] In Supreme Judicial Court of Massachusetts

Opinion

Rugg, C. J.:

The plaintiff seeks by this action to recover compensation for personal injuries sustained by him by reason of the derailment of a railroad motor car, on which he was riding in the course of his employment by the defendant, as a

result of the negligence of a fellow employee. These facts, as of the time of the injury to the plaintiff, were agreed at the trial: the defendant was a common carrier for hire of freight and passengers operating tracks in Maine, New Hampshire, Vermont and New York, as well as in Massachusetts, and was conducting both interstate and intrastate commerce of considerable magnitude, and was not a subscriber under the workmen's compensation act of this Commonwealth, G. L. c. 152; the plaintiff was engaged in intrastate and not in interstate commerce; there was no evidence to support a finding that the injury to the plaintiff was due to any contractual assumption of risk on his part, or that he was not in the exercise of due care. The ruling of the trial judge that there was no evidence of negligence of the defendant as distinguished from negligence of its servants or agents is not now challenged. The trial judge also found that the injury to the plaintiff was caused by the negligence of a fellow servant, and made a finding for the plaintiff.

The defendant contends that the workmen's compensation act (hereafter called the act) is not applicable to a railroad engaged in both intrastate and interstate commerce, and that hence the defence that the injury to the plaintiff was caused by a fellow servant is open to it notwithstanding the provision of G. L. c. 152, § § 66, 67, to the effect that such defence, with exceptions not here material, is denied [fol. 34] to an uninsured employer. Bernabeo v. Kaulback, 226 Mass. 128. McGonigle v. O'Neill, 240 Mass. 262, 263. It was assumed that the act was so applicable for the purposes of the decision in Ashton v. Boston & Maine Railroad, 222 Mass. 65, 69, Henshaw v. Boston & Maine Railroad, id. 459, 461, and Lyford v. Boston & Maine Railroad, 227 Mass. 10, and the contrary assumption was made in Hix v. New York Central & Hudson River Railroad, 230 Mass. 309, 312. The question was expressly left open in Cox's Case, 225 Mass. 20, 223, has never been and must now be decided.

At the outset it is to be observed as the basis of this opinion that the act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce. It was said in Seaboard Air Line v. Horton, 233 U. S. 492, at 501: "It is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employes in interstate trans-

portation by rail, all state laws upon the subject are superseded. Second Employers' Liability Cases, 223 U. S. 1, 55." That statement applies also to all State laws thereafter enacted; they are void in their application to the subject of interstate commerce, no matter how phrased.

The relevant provisions of the workmen's compensation act are these sections of G. L. c. 152:

1. "The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings: * * * (4) 'Employee,' every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, [fol. 35] business, profession or occupation of his employer. * * *"

§ 66. "In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence 1, that the employee was negligent; 2, that the injury was caused by the negligence of a fellow employee; 3, that the employee had assumed the risk of the injury."

§ 67. "The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person."

It is provided by § 68 that the employers' liability act, both in respect to personal injuries, G. L. c. 153, and death, G. L. c. 229, §§ 4, 7, 8, 9, 10, shall not apply to the employees of an insured person. The act as originally enacted in St. 1911, c. 751, Part V, § 2, the Part corresponding to said § 1 (4), contained, as one of the limitations on the wide sweep of "employee" as defined, the words, "and except one whose employment is but casual." Gaynor's Case, 217 Mass. 86. Those words were stricken from the section by St. 1914, c. 708, § 13. That original section did not contain among the limitations upon the definition of "em-

ployee" the words, "except masters of and seamen on vessels engaged in interstate or foreign commerce"; they were added by St. 1913, c. 568, § 1.

The words of § 1 (4) just quoted are of broad import. It is difficult to confine by construction a definition of employee which states explicitly that it includes "every person in the service of another under any contract of hire," with two specified exceptions. The main purpose of the act reenforces the comprehensiveness of this definition. That purpose was to substitute a method of accident insurance, in place of the rights and liabilities established [fol. 36] by the common law as modified by the employers' liability act and other statutes, for substantially all employees save the excepted classes, to the extent that the attainment of that result was within the jurisdiction of the General Court. It was a humanitarian measure enacted in response to the conviction that previous remedies had failed to give the measure of relief to employees for personal injuries arising out of their employment demanded by modern conditions. Although the act was optional and not compulsory, its general tenor disclosed a legislative aim to secure its wide adoption and use. The interpretation of the act has been and ought to be, so far as reasonably practicable, to promote the accomplishment of its beneficent design. Express exclusion of two classes of employees from the operation of the act and the enactment of two amendments to the excluding clause are strong indications that all others within the natural purport of its language were to be included. If it had been the intent of the Legislature to exclude railroads engaged in interstate commerce from the operation of the act, it would have been a simple matter to state that intent in unequivocal language. The words, purpose, and legislative history of the act as now phrased require the conclusion that it was intended to be applicable to all classes of injuries therein described within the competency of the legislative department. "The statute is as broad as the jurisdiction of the Commonwealth." Kinney v. Treasurer & Receiver General, 207 Mass. 368, 369. Young v. Duncan, 218 Mass. 346, 349. Gillard's Case, 244 Mass. 47, 51, 52. Toland's Case, 258 Mass. 470, 472. The decision in Zoulalian v. New England Sanitorium & Benevolent Association, 230 Mass. 102, rests upon the general principle of exoneration of charitable trusts from liability

[fol. 37] for negligence of their servants and agents. There was no ground for substitution of workmen's compensation liability because there was at common law no liability. Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66.

The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce. Corbett v. Boston & Maine Railroad, 219 Mass. 351, 356. Barrows v. Farnum's Stage Lines, Inc., 254 Mass. 240, 245-246, and cases there reviewed. Commonwealth v. Potter, id., 271, 273. It was said in Wabash Railroad v. Hayes, 234 U. S. 86, 89-90:

"Had the injury occurred in interstate commerce * * * the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative. [Cases cited.] On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the State was controlling. Illinois Central Railroad v. Behrens, 233 U. S. 473." Taylor v. Taylor, 232 U. S. 363, 368. Michigan Central Railroad v. Vreeland, 227 U. S. 59, 66-67. Toledo, St. Louis & Western Railroad v. Slavin, 236 U. S. 454. Raymond v. Chicago, Milwaukee & St. Paul Railway, 243 U. S. 43, 45.

There are numerous cases where decisions of State courts have been reversed because recovery had been allowed under workmen's compensation laws when, as the United States Supreme Court held, the injury had occurred while the employee was engaged in interstate commerce and where, therefore, the State laws were inapplicable and the Federal employers' liability act governed the rights and liabilities of the parties. New York Central Railroad Co. v. Winfield, 244 U. S. 147. New York Central Railroad v. [fol. 38] Porter, 249 U. S. 168. Southern Pacific Co. v. Industrial Accident Commission, 251 U. S. 259. See, also, American Railroad Co. v. Birch, 224 U. S. 547. It does not appear to have been suggested in any of these decisions that railroad corporations were not subject to State workmen's compensation acts as to their intrastate business. It was said by Chief Justice Marshall in Gibbons v. Ogden,

9 Wheat. 1, at 195: "The completely internal commerce of a State, then, may be considered as reserved for the State itself."

Both the words and the purpose of the act seem to require the conclusion that, with respect to the injury to the plaintiff occurring while he was engaged in intrastate commerce, the defendant is deprived of the defence that the injury was caused by a fellow servant of the plaintiff.

There is nothing contrary to this conclusion in Cox's Case, 225 Mass. 220. It there was held that an employer must insure the whole of his business conducted within the Commonwealth as a single commercial or manufacturing entity, in order to secure the benefits of the act, and could not accept the act as to one part of that business and reject it as to another part. Transportation companies conducting both intrastate and interstate commerce were expressly excepted, at page 223, from the scope of that decision. Whatever was there said was directed to the issue then before the court. The act does not require, and the decision in the Cox case does not mean, that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act [fol. 39] with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court. It is an implied condition of all statutes that they are intended to be operative only within the jurisdiction of the legislative body enacting them. This statement is subject to the limitation that, where an insured employer makes a contract in Massachusetts with one to become his employee and to do work outside the Commonwealth, there may be recovery under the

act by the employee, if injured, according to the terms of St. 1927, c. 309, §§ 2, 3. Pederzoli's Case, 269 Mass. 550. McLaughlin's Case, Mass. Adv. Sh. (1931) 243. See Keaney's Case, 217 Mass. 5; compare Gould's Case, 215 Mass. 480.

It is often a question of difficulty whether a particular injury arose out of intrastate or interstate commerce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business. There are differences in certain instances as to the persons entitled to recovery and the persons to whom the amount recovered may ultimately be payable under the Federal employers' liability act and under the workmen's compensation act. These and other differences appear to us to constitute merely difficulties of a kind not infre- [fol. 40] quently encountered in the practical administration of affairs, but not to amount to insurmountable obstacles in the way of construing the scope of the statute according to its words and purpose.

The same employees may be engaged alternately during stated periods in intrastate and in interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to indicate that reasonably accurate estimates of the proportion of time of employees spent in intrastate and interstate commerce cannot be made. The contrary cannot be assumed in the absence of proof. It may be troublesome for the defendant to establish a basis for the insurance of the portion of its employees engaged in intrastate commerce. That, however, is a legislative and not a judicial question. We can only interpret the statute as it was framed. Arruda v. Director General of Railroads, 251 Mass. 255, 262-263.

The same considerations apply to rules and regulations for the prevention of accidents required by G. L. c. 152, § 64. Such rules and regulations could not interfere with interstate commerce. So far as relevant exclusively to intrastate commerce, they do not go outside the legislative domain of this Commonwealth.

Reliance is placed by the defendant on the contention that, if under the act it should insure its employees so far as engaged in intrastate business, it would not be relieved of the liability for the death of such an employee imposed by G. L. c. 229, § 3, and that, therefore, the Legislature could not [fol. 41] have intended the act to apply to a carrier like the defendant. The liability imposed by said § 3 is in the nature of a penalty for causing the death of an employee in the circumstances there set forth. It was first enacted in substance by St. 1883, c. 243. It has since remained in our statutes. It was unaffected by the enactment of the employers' liability act, St. 1887, c. 270, §§ 2, 3. The history of these statutory developments touching recovery of damages for causing death is set forth in detail in Brooks v. Fitchburg & Leominster Street Railway, 200 Mass. 8. If it be assumed that the operative force of said § 3 would not be affected as to the defendants by its becoming insured under the workmen's compensation act, that does not justify the inference that the Legislature did not intend to include railroad corporations conducting both intrastate and interstate commerce within the sweep of the act. The liability established by said § 3 is punitive in nature; the penalty is to be assessed solely with reference to the degree of culpability of the defendant, or its agents or servants, and it coexists now as always hitherto with the liability for death established by the employer's liability act. G. L. c. 229, §§ 4, 7, 8, 9, 10. G. L. c. 153. The measure of damages and the basis of liability are different under said § 3 and under said § 9.

The intention of the General Court in enacting any statute must be ascertained, not alone from the literal meaning of its words, but from a view of the whole system of which it is but a part, and in the light of the common law and previous statutes on the same subject. Robinson's Case, 131 Mass. 376, 377. Duggan v. Bay State Street Railway, 230 Mass. 370, 374. Commonwealth v. Welosky, Mass. Adv. Sh. 1671. Giving full weight to that principle, we think [fol. 42] that the act is applicable to the defendant as to its employees while engaged in intrastate commerce.

The defendant contends that thus interpreted the act is unconstitutional as applied to the defendant, in that it imposes an undue burden upon interstate commerce contrary to art. 1, § 8, of the Constitution of the United States. No statute of the Commonwealth can impose a burden upon in-

terstate commerce. That is fundamental under our dual system of government. New England Telephone & Telegraph Co. v. Department of Public Utilities, 262 Mass. 137, 149, and cases cited. Sprout v. South Bend, 277 U. S. 163. The Minnesota Rate Cases, 230 U. S. 352, 398-412. New Jersey Telephone Co. v. Tax Board, 280 U. S. 338, 346. In Sherlock v. Alling, 93 U. S. 99, at 103, it was said:

"In conferring upon Congress the regulation of commerce, it was never intended to cut off the States from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." Pennsylvania Railroad v. Hughes, 191 U. S. 477, 488. Missouri Pacific Railway v. Castle, 224 U. S. 541, 544-545. Chicago, Milwaukee & St. Paul Railway v. Solan, 169 U. S. 133, 137-138.

The workmen's compensation act is an exercise of the police power of the Commonwealth. Mountain Timber Co. v. Washington, 243 U. S. 219, 238-239. Madera Sugar Pine Co. v. Industrial Accident Commission, 262 U. S. 488, 501-502.

The provisions of G. L. c. 152, as herein interpreted, do not in our opinion burden the interstate commerce of the defendant. Whether the defendant shall avail itself of that [fol. 43] act is wholly optional with it. If it does not insure in accordance with its provisions, it cannot, in common with all other employers in like situation, interpose the defences of assumption of risk, contributory negligence, or the fellow servant doctrine in actions for personal injury brought against it by its employees engaged in intrastate commerce. It was said touching this subject in Opinion of the Justices, 209 Mass. 607, at page 610:

"The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defences (as it has to some extent in the employers' liability act) as in its wisdom in the exercise of powers entrusted to it by the Constitution it deems will

be beat for the 'good and welfare of this Commonwealth.' Const. Mass. c. 1, § 1, art. 4. See Missouri Pacific Railway v. Mackey, 127 U. S. 205; Minnesota Iron Co. v. Kline, 199 U. S. 593."

To the same effect are New York Central Railroad v. White, 243 U. S. 188, 200, and cases cited, and Silver v. Silver, 280 U. S. 117, 122. If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the commissioner of insurance requires that "Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance." As [fol. 44] applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts and those, if any, entitled to the benefits of St. 1927, c. 309, §§ 2, 3. That is the only payroll of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce. Such premiums would not be a burden upon interstate commerce. If such insurance would have any effect on interstate commerce, it would be purely incidental and therefore would infringe upon no constitutional inhibitions. Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 445, 450. Interstate Busses Corp. v. Holyoke Street Railway, 273 U. S. 45. See cases collected in Commonwealth v. Peoples Express Co. 201 Mass. 564, at 578.

If the defendant is advised that the rules of the commissioner of insurance as at present framed do it an injustice, that does not render the act unconstitutional. The law doubtless affords remedies if on proper representation that official does not make rules just and legal in their operation on the defendant.

It cannot be presumed, in the absence of any evidence or finding, that a fair and equitable method of ascertaining and computing the premiums due from the defendant in re-

spect to insurance of its employees engaged in intrastate commerce cannot be worked out if it desires to become an insured employer under the act. Certainly we cannot take judicial notice that there is any such practical impossibility. The evidence in the present record does not require a finding of that nature. The defendant requested no ruling on this point and hence it is not open to it.

The essential points of the case at bar, so far as they re- [fol. 45] late to interstate commerce, seem to us to be concluded against the contention of the defendant by the decisions in New York Central Railroad v. White, 243 U. S. 188, and Hawkins v. Bleakly, id. 210.

Order dismissing report affirmed.

[fol. 46] Clerk's certificate to foregoing paper omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILE
OCT 20
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

v.

FRED ARMBURG, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, IN THE COUNTY OF SUFFOLK AND STATE OF MASSACHUSETTS, AND SUPPORTING BRIEF.

PHILIP N. JONES,
HURLBURT, JONES & HALL,
Attorneys for Petitioner.

(36,291)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

v.

FRED ARMBURG, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, IN THE COUNTY OF SUFFOLK AND STATE OF MASSACHUSETTS.

To the Honorable the Supreme Court of the United States:

The Boston and Maine Railroad, a corporation established under the laws of the State of Massachusetts, having a usual place of business in Boston in the State of Massachusetts and engaged in operating a railroad in both interstate and intrastate commerce in Massachusetts and other States, respectfully prays for a writ of certiorari to be directed to the Municipal

Court of the City of Boston in said State of Massachusetts, to review a cause in that court wherein Fred Armburg of Acton in the County of Middlesex is plaintiff and your petitioner is defendant, and wherein final judgment was entered for the respondent herein, the plaintiff below, in the sum of $28,893.41 on the 25th day of September, 1931 (R. p. 3).

The petitioner and the respondent are hereinafter respectively referred to as the defendant and the plaintiff.

The said Municipal Court of the City of Boston, which rendered the judgment, is the highest court of the State wherein a decision could be had.

At the time of the injury on account of which the plaintiff sued as hereinafter stated, the Workmen's Compensation Act, Massachusetts General Laws, Chapter 152, provided for the taking of insurance by employers against injury to their employees in various amounts according to the nature of the injury.

Certain sections and portions of sections of said Chapter are as follows:

> SECTION 21. Every insured person shall, as soon as he secures a policy, give written or printed notice to all persons under contract of hire with him that he has provided for payment to injured employees by the insurer.
>
> SECTION 22. Every insured person shall give written or printed notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the insurer.
>
> SECTION 24. An employee of an insured person shall be held to have waived his right of

action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance.

SECTION 26. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury.

Sections 28, *et seq.*, regulate the amount and duration of compensation in case of injury.

Insurance by an employer is not made compulsory, but an employer who does not insure is, by Sections 66 and 67, in an action at common law by his employee, deprived of the common law defenses of contributory negligence, negligence of a fellow-employee and assumption of the risk.

SECTION 66. In an action to recover damages for personal injuries sustained by an employee

in the course of his employment, or for death resulting from personal injury so sustained it shall not be a defense:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury.

SECTION 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person.

The cause in which the judgment was entered was an action of tort at common law, in which the plaintiff sought to recover damages for injuries sustained by him in this Commonwealth by reason of the alleged negligence of the defendant, its agents and servants (R. p. 4).

The defendant set up in its answer, *inter alia*, that the plaintiff's injuries were due solely to the negligence of a fellow servant and that the plaintiff assumed the risk of the same (R. p. 4).

The defendant, at the time of the plaintiff's injury, was a common carrier of goods and passengers for hire and owned or leased railroad tracks which it used in its business. Its tracks extended from point to point within the State of Massachusetts and also from points in Massachusetts to points in various other States specified, and it was engaged in the business of transporting both freight and passengers over such

tracks from point to point within the State of Massachusetts and from points within that State to points in other States and from points in other States to points in Massachusetts (R. p. 5).

The plaintiff, who was an employee of the defendant (R. p. 5), was not employed in interstate commerce at the time of his injury but was employed in intrastate commerce (R. p. 5). The defendant was not a subscriber under the provisions of the Massachusetts Workmen's Compensation Act (R. p. 5), *i. e.*, it had not provided by insurance for compensation to its employees in case of injury.

The defendant requested the court to rule that the Workman's Compensation Act, Massachusetts General Laws, c. 152, and Section 66 thereof, did not apply to the defendant, a railroad corporation engaged in both intrastate and interstate commerce (R. p. 24). It also requested a ruling that if said act and section 66 thereof be construed as applying to the defendant, a railroad corporation engaged in both intrastate and interstate commerce, it was in violation of the Commerce Clause, Art. I, Sec. 8 of the Constitution of the United States, and that for these reasons the defense that the plaintiff's injuries were caused by the negligence of a fellow servant was open to the defendant (R. p. 24), and the plaintiff was not entitled to recover (R. p. 24).

The trial court found that the cause of the plaintiff's injuries was the negligence of a fellow servant, refused the foregoing requests for rulings, found for the plaintiff in the sum of $26,500, and reported the defendant's requests for rulings to the Appellate Divi-

sion of the Municipal Court for determination (R. pp. 25-26).

The Appellate Division entered a final order dismissing the report (R. p. 24), holding in its opinion (R. p. 28) that the provisions of the Compensation Act applied to a railroad corporation operating in both interstate and intrastate commerce and, in effect, that the act was not intended by the Legislature to require insurance upon risks incident to interstate commerce, did not therefore place a burden upon interstate commerce, and therefore that the defense that the injury was caused by the negligence of a fellow employee was not open to the defendant (R. pp. 28-30). The defendant appealed to the Supreme Judicial Court of the State of Massachusetts from the order of the Appellate Division dismissing the report (R. p. 28).

The Supreme Judicial Court entered a rescript affirming the order of the Appellate Division dismissing the report (R. p. 31), and on September 25, 1931, the Municipal Court of the City of Boston entered the judgment in question (R. p. 3).

In its opinion (Mass. Adv. Sheets, 1931, p. 1751), the Supreme Court, although recognizing that it may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic (Mass. Adv. Sheets, 1931, p. 1757, Opinion, p. 37), held that the act in question applied to the defendant as to its employees while engaged in intrastate commerce (Mass. Adv. Sheets, 1931, p. 1758, Opinion, p. 38), and that as so construed it did not violate the Commerce Clause

of the Federal Constitution (Mass. Adv. Sheets, 1931, pp. 1759-1761, Opinion, pp. 38-41).

The court in its opinion ruled that, under the terms of the act as construed, if the defendant insured in conformity thereto, it need not insure its employees so far as engaged in interstate commerce, and can gain whatever advantages arise from the acceptance of the act by confining its insurance strictly to its employees to the extent that they are engaged in intrastate commerce, and is therefore required to pay premiums based not on its entire payroll, but only on the part allocated to intrastate commerce; that any effect of such premiums on interstate commerce would be merely incidental and would not infringe upon the Commerce Clause of the Constitution (Mass. Adv. Sheets, 1931, p. 1760, Opinion, p. 40).

The reasons relied upon for the allowance of the writ are as follows:

1. The Massachusetts Workmen's Compensation Act, Massachusetts General Laws, chapter 152, as construed in the instant case, requires railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in intrastate commerce, or be subjected to actions at law without the benefit of the common law defenses of contributory negligence, assumption of the risk and negligence of a fellow servant.

Classification, for the purposes of such insurance, of the employees of a railroad engaged in both interstate and intrastate commerce between those engaged in interstate commerce and those engaged in intra-

state commerce and the separation of the employees' services as between the two classes of commerce, so that such a railroad can insure its employees in so far as they are engaged in intrastate commerce, without burdening interstate commerce, is impossible.

The Workmen's Compensation Act in so far as it requires a railroad engaged in both interstate and intrastate commerce to insure its employees to the extent that they are engaged in intrastate commerce, or otherwise be subjected to actions at common law without the benefit of the said common law defenses, is in violation of the Commerce Clause, Art. I, Sec. 8, of the Constitution of the United States, in that it imposes a burden upon interstate commerce, and in an action by an employee against a non-insuring railroad corporation engaged in both interstate and intrastate commerce such common law defenses are open to the railroad, and were open to the defendant in the instant case.

2. Even if it were not impossible for a railroad corporation engaged in both interstate and intrastate commerce to insure to the extent that its employees are engaged in intrastate commerce, the burden involved in the segregation of the services and risks referrable to such intrastate commerce and the requirement that such a railroad shall so insure or be subjected to actions at common law for injuries received by its employees, without the benefit of the common law defenses in question, constitutes a burden upon interstate commerce in violation of the Commerce Clause, Art. I, Sec. 8 of the Constitution of the United

States, and in an action by an employee against such a railroad corporation the defenses of contributory negligence, assumption of the risk and negligence of a fellow servant are open to the defendant, and were so open in the instant case.

3. The general reasons for the allowance of the writ are the public importance of the questions involved and the fact that they have not heretofore been determined by this Court.

BOSTON AND MAINE RAILROAD,
Petitioner,

By Its Attorneys,
PHILIP N. JONES,
HURLBURT, JONES & HALL.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

v.

FRED ARMBURG, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

1. The opinion in the Supreme Judicial Court of Massachusetts was filed September 12, 1931, and is reported in Mass. Adv. Sheets, 1931, page 1751. It is included at page 33 of the record. The opinion of the Appellate Division of the Municipal Court of the City of Boston is included at page 28 of the record.

Jurisdiction.

2. Jurisdiction to review this cause exists under Judicial Code, Sec. 237 (*b*) as amended by Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 937.

The date of entry of the judgment in the cause sought to be reviewed was September 25, 1931 (R. p. 3). The judgment was rendered by the Municipal Court of the City of Boston, the highest court of the state in which a decision could be had.

The statute of the State of Massachusetts, the validity of which was drawn in question, is the Workmen's Compensation Act, so-called, Massachusetts General Laws, chap. 152, which provides that an employer may provide by insurance for the payment to his employees of compensation for injury arising in the course of their employment (Secs. 21, 22, 26), and that unless an employee of an insured person gives his employer notice that he claims his right of action at common law, he shall be held to have waived it (Sec. 24), and if injured is entitled to compensation from the insurer according to the nature of his injury, and further provides that in case an employer does not so insure—

> SECTION 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:
>
> 1. That the employee was negligent;
>
> 2. That the injury was caused by the negligence of a fellow employee;
>
> 3. That the employee had assumed the risk of the injury.
>
> Section 67. The preceding section shall not apply to actions * * * for * * * injuries received by employees of an insured person.

Other material portions of this statute are set forth in the appendix (p. 12 *infra*).

This statute, and Section 66 thereof, is claimed to be in violation of the Commerce Clause, Art. I, Sec. 8, of the Constitution of the United States, as applied to the defendant, a railroad corporation engaged in both interstate and intrastate commerce, it having been construed by the Courts below to apply to the defendant (Rulings of Municipal Court, R. pp. 23-26, Opinion of Appellate Division, R. pp. 28-30, Opinion Supreme Court of Massachusetts, Mass. Adv. Sheets, 1931, p. 1751).

Statement of Case.

3. The cause was an action of tort at common law, in which the plaintiff sought to recover damages for injuries sustained by him in this Commonwealth by reason of the alleged negligence of the defendant, his employer, its agents and servants (R. p. 4).

The defendant set up in its answer that the plaintiff's injuries were due solely to the negligence of a fellow servant and that the plaintiff assumed the risk of the same (R. p. 4).

The defendant, a railroad corporation, was a common carrier of goods and passengers for hire and as such carrier was engaged in both interstate and intrastate commerce (R. p. 5).

The plaintiff, who was an employee of the defendant (R. p. 5), was not employed in interstate commerce at the time of his injury, but was engaged in intrastate commerce (R. p. 5). The defendant was not a subscriber under the provisions of the Work-

men's Compensation Act (R. p. 5), *i. e.*, it had not provided by insurance for compensation to its employees in case of injury.

The defendant requested the Court to rule that the Workmen's Compensation Act, Massachusetts General Laws, chap. 152, and Section 66 thereof, did not apply to the defendant, a railroad corporation engaged in both interstate and intrastate commerce (R. p. 24).

It also requested a ruling that if said act and section 66 thereof be construed as applying to the defendant, a railroad corporation engaged in both intrastate and interstate commerce, it was in violation of the Commerce Clause, Art. I, Sec. 8, of the Constitution of the United States, and that for these reasons the defense that the plaintiff's injuries were caused by the negligence of a fellow servant was open to the defendant (R. p. 24) and the plaintiff was not entitled to recover (R. p. 24).

The trial court found that the cause of the plaintiff's injuries was the negligence of a fellow servant, refused the foregoing requests for rulings, found for the plaintiff in the sum of $26,500, and reported the defendant's requests for rulings to the Appellate Division of the Municipal Court for determination (R. pp. 25-26).

The Appellate Division entered a final order dismissing the report (R. p. 24), and the defendant appealed to the Supreme Judicial Court of Massachusetts from the order of the Appellate Division (R. p. 28). That Court entered a rescript affirming to order of the Appellate Division dismissing the report

(R. p. 31), and judgment was entered for the plaintiff by the Municipal Court of the City of Boston in the sum of $28,843.91 (R. p. 3).

In its opinion the Supreme Court of the State held the act to be applicable to the defendant as to its employees while engaged in intrastate commerce only, and as so construed, not to be in violation of the Commerce Clause of the Federal Constitution.

Armburg v. Boston & Maine Railroad, Mass. Adv. Sheets, 1931, pp. 1758-1760 (Opinion pp. 38-41).

Specification of Errors.

4. (1) The court below erred in ruling and holding that Massachusetts General Laws, Chapter 152 and Section 66 thereof, requiring railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in intrastate commerce, or be subject to actions at common law without the benefit of the common law defenses of negligence of fellow servants, assumption of the risk and contributory negligence are not in violation of the Commerce Clause, Art. I, Sec. 8 of the Constitution of the United States and void, and that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant.

(2) The court below erred in ruling and holding that Massachusetts General Laws, Chapter 152 and Section 66 thereof, requiring railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in inter-

state commerce, or be subject to actions at common law without the benefit of the common law defenses of negligence of fellow servants, assumption of the risk and contributory negligence, are not in violation of the Commerce Clause, Art. I, Sec. 8 of the Constitution of the United States, and void.

(3) For the above reasons the Court below erred in ruling and holding that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant, and in entering judgment for the plaintiff.

The Commerce Clause of the Constitution of the United States, Section 1 of the Federal Employers' Liability Act, and certain portions of Mass. General Laws, Chap. 152, Massachusetts Workmen's Compensation Act, are set forth in an appendix to this brief.

ARGUMENT.

5. The segregation, for the purposes of insurance, of the services of the defendant's employees to the extent that they pertain to intrastate commerce, and the insurance of its employees to the extent only that they are engaged in intrastate commerce, is an impossibility.

Service as affecting the two classes of commerce are so interwoven that allocation is out of the question.

Illustrations are so obvious that specific mention of them would be superflous. Some of them are mentioned in the cases cited.

That this is a matter of common knowledge is recognized by the decisions of this Court.

Baltimore & Ohio R. R. v. Interstate Commerce Commission, 221 U. S. 612, 618.
Southern Railway Co. v. United States, 222 U. S. 20, 27.
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 213.

These considerations apply with peculiar force to the case of any attempted insurance of such a carrier's employees to the extent only that they are engaged in one kind of traffic or the other. The extent to which an employee has in a given period acted with respect to intrastate commerce is obviously impossible of determination in cases where his services may pertain to both classes of traffic.

But in the administration of the insurance provisions of the act such determination has to be made in advance, and under the act risks and premiums are classified.

Section 52. (See appendix page 14, *infra*.)

The impossibility of determining the extent to which an employee will act with respect to intrastate commerce in a given period in the future, and the degree of risk referrable to such intrastate service, is therefore even more apparent.

Decisions arising under the Federal Employers' Liability Act, determining that an employee is acting with respect to one kind of commerce or another, have no bearing.

While it may be possible, though difficult, in a given case, to determine whether an employee is engaged at a specific time in intrastate or interstate commerce,

determination of the extent to which each employee will for a given period in the future affect intrastate commerce only is manifestly out of the question.

Inasmuch as for the purposes of insurance of employees their employment as to the two classes of commerce cannot be severed, anything affecting the one class of commerce by its necessary operation affects the other class and a direct burden upon the one operates as a direct burden upon the other.

And the Congress having legislated with respect to the liability of employees engaged in interstate commerce.

> *Federal Employers' Liability Act,* Apr. 22, 1908, c. 149, §1, 35 Stat. 65,

the State statute in question, inasmuch as in view of the considerations mentioned, it directly burdens interstate commerce, is in violation of the Commerce Clause of the Federal Constitution.

> *Houston & Texas Railway v. United States,* 234 U. S. 342, 351.
>
> *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission,* 221 U. S. 618.
>
> *Southern Railway Co. v. United States,* 222 U. S. 20, 26.
>
> *International Paper Co. v. Commonwealth of Massachusetts,* 246 U. S. 135.

The Supreme Court of the State in its opinion, although recognizing to some extent the impossibility of classifying or separating the two kinds of traffic for the purposes under consideration, failed to give effect to the consequences flowing therefrom.

We quote passages from the opinion:

> "It is often a question of difficulty whether a particular injury arose out of intrastate or interstate commerce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business."
>
> *Armburg v. Boston & Maine R. R.*, Mass. Adv. Sheets, 1931, p. 1756.

> "It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required."
>
> Mass. Adv. Sheets, 1931, p. 1757.

> "If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce."
>
> Mass. Adv. Sheets, 1931, p. 1760.

The instant case is to be distinguished from those in which the effect of State legislation upon interstate commerce is held indirect and remote;

Sherlock v. Alling, 93 U. S. 99;

The Minnesota Rate Cases, 230 U. S. 352,

but comes within the principle applied in *International Paper Co. v. Commonwealth of Massachusetts,* 246 U. S. 135, wherein the Court say, at page 141:

> "Under the commerce clause exclusive power to regulate interstate commerce rests in Congress and a State statute which either directly or by its necessary operation burdens such commerce is invalid regardless of the purpose with which it was enacted."

Moreover, the labor and expense of attempting to segregate the services of its employees, with respect to the two kinds of traffic, imposed upon the railroad, and therefore imposed in part upon interstate commerce, constitutes a burden thereon, and for this additional reason the act violates the constitutional provision referred to.

Although under the act, insurance is not compulsory, the only alternative is that of being deprived in an action at law of the common law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant. Failure to insure is thus penalized by the withdrawal of such defenses.

Young v. Duncan, 218 Mass. 346,

wherein the Court say with reference to the Act at page 349:

> "It was not made compulsory in its application but inducements were held out to facilitate its voluntary acceptance by both employers and employees."

Inasmuch, therefore, as under the act the failure to insure is penalized by the withdrawal of the common

law defenses, and the insurance requirements are invalid as applied to the defendant, the attempted withdrawal of the common law defenses by Section 66 is ineffectual, such defenses were open to the defendant at the trial, and upon the findings of the Municipal Court that the injury was caused by a fellow servant (R. p. 26), the defendant was entitled to judgment.

Respectfully submitted,

PHILIP N. JONES,
HURLBURT, JONES & HALL,
Attorneys for Petitioner.

APPENDIX.

Statutes.

Constitution of United States, Article I, Section 8.

The congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; * * * and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Act Apr. 22, 1908, *c.* 149, §1, 35 *Stat.* 65.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Massachusetts General Laws, Chap. 152.

SECTION 1. The following words as used in this

chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

* * * * * * *

(4) "Employee", every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer. * * *

* * * * * * *

(6) "Insured" or "insured person", an employer who has provided by insurance for the payment to his employees of the compensation required by this chapter.

(7) "Insurer", any insurance company which has insured the compensation payable by an employer under this chapter.

SECTION 21. Every insured person shall, as soon as he secures a policy, give written or printed notice to all persons under contract of hire with him that he has provided for payment to injured employees by the insurer.

SECTION 22. Every insured person shall give written or printed notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the insurer. * * *

SECTION 24. An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given

his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. * * *

SECTION 26. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury. * * *

SECTION 52. Any insurance company authorized to transact business in this commonwealth under subdivision (*b*) or (*e*) of the sixth clause of section forty-seven of chapter one hundred and seventy-five may, except as provided in clause (*c*) of section fifty-four of said chapter, insure the payment of the compensation provided for by this chapter, and when any such company insures the payment of such compensation it shall file with the commissioner of insurance its classifications of risks and premiums relating thereto and subsequent proposed classifications or premiums, which shall not take effect until approved by the commissioner of insurance as adequate and reasonable for the risks to which they respectively apply; provided, that upon petition of the company or any other party aggrieved the opinion of the commissioner shall be subject to review by the supreme judicial court. The commissioner may withdraw his approval.

SECTION 54. Policies of workmen's compensation insurance issued or delivered in the commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by this chapter, whatever other contingencies may be insured by riders attached thereto or endorsements thereon. * * *

SECTION 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury.

SECTION 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person.

SECTION 68. Chapter one hundred and fifty-three and sections four and seven to ten, inclusive, of chapter two hundred and twenty-nine shall not apply to employees of an insured person. * * *

Chapter 153, referred to in Section 68, is the State Employers' Liability Act, so-called, which abrogated the common law defenses in cases involving the negligence of superintendents and certain others in authority.

Sections 4 and 7 to 10 of Chapter 229 provide remedies in cases of death resulting from injuries for which the employer is liable under Chapter 153.

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CHARLES ELMOR

Supreme Court of the United States.

October Term, 1931.

No. 477.

Boston and Maine Railroad,
Petitioner,

v.

Fred Armburg,
Respondent.

On Writ of Certiorari to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts.

MOTION TO AMEND PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

PHILIP N. JONES,
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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
PETITIONER,
v.
FRED ARMBURG,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

MOTION TO AMEND PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

Now comes the Boston and Maine Railroad, petitioner in the above-entitled cause, and moves to amend its petition for a writ of certiorari by adding to the statement in the petition of the reasons relied upon for the allowance of the writ (Petition, pp. 7-9) the following reasons:

1 (*a*). The Massachusetts Workmen's Compensation Act, Massachusetts General Laws, c. 152, in so far as it provides that railroads engaged in both interstate and intrastate commerce shall insure their employees against injury received in the course of their employment to the extent that

their employees are engaged in intrastate commerce, and, in event of their failure to do so, subjects them to actions at law without the benefit of the common-law defenses of contributory negligence, assumption of the risk, and negligence of a fellow servant, is in conflict with and violates the Commerce Clause, art. I, sec. 8, of the Constitution of the United States, and the laws of Congress enacted by virtue of the power thereby conferred, and is invalid, and in an action by an employee against a railroad corporation engaged in both interstate and intrastate commerce which has not insured its employees in accordance with said Workmen's Compensation Act, such common-law defenses are open to the railroad, and were open to the defendant in the instant case.

1 (*b*). The Massachusetts Workmen's Compensation Act, Massachusetts General Laws, c. 152, in so far as it provides that railroads engaged in both interstate and intrastate commerce shall insure their employees against injury received in the course of their employment to the extent that their employees are engaged in intrastate commerce, and, in event of their failure to do so, subjects them to actions at law without the benefit of the common-law defenses of contributory negligence, assumption of the risk, and negligence of a fellow servant, is in conflict with and violates the Act of Congress, April 22, 1908, c. 149, commonly known as the Federal Employers' Liability Act, the Acts of Congress relative to the installation and use of safety appliances and equipment upon locomotive engines and cars employed in interstate commerce, namely, the Act of March 2, 1893, c. 196; the Act of March 2, 1903, c. 976; the Act of April 14, 1910, c. 160; the Act of May 30, 1908. c. 225; the Act of February 17, 1911, c. 103; the Act of June 7, 1924, c. 355; and Act of March 4, 1907, c. 2939, entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees thereon," and is invalid, and in an action by an employee against a railroad corporation engaged in both interstate and intrastate commerce which

has not insured its employees in accordance with said Workmen's Compensation Act, such common-law defenses are open to the railroad, and were open to the defendant in the instant case.

The petitioner also moves to amend the specification of errors contained in the brief in support of its said petition for certiorari (Brief, pp. 5, 6) by adding thereto the following specifications of error:

4. The Court below erred in ruling and holding that Massachusetts General Laws, c. 152, and section 66 thereof, requiring railroads engaged in both interstate and intrastate commerce to insure their employees against injury arising in the course of their employment to the extent that their employees are engaged in intrastate commerce, and, in event of their failure to so insure, subjecting them to actions at law without the benefit of the common-law defenses of assumption of the risk, contributory negligence, and negligence of a fellow servant are not in conflict with and in violation of the Commerce Clause, art. I, sec. 8, of the Constitution of the United States and the laws of Congress enacted by virtue of the power thereby conferred, and invalid and void.

5. The Court below erred in ruling and holding that Massachusetts General Laws, c. 152, and section 66 thereof, requiring railroads engaged in both interstate and intrastate commerce to insure their employees against injury arising in the course of their employment to the extent that their employees are engaged in intrastate commerce, and, in event of their failure to so insure, subjecting them to actions at law without the benefit of the common-law defenses of assumption of the risk, contributory negligence, and negligence of a fellow servant are not in conflict with and in violation of the Act of Congress April 22, 1908, c. 149, commonly known as the Federal Employers' Liability Act, the Acts of Congress relative to the installation and use of safety appliances and equipment upon locomotive engines and cars employed in

interstate commerce, namely, the Act of March 2, 1893, c. 196; the Act of March 2, 1903, c. 976; the Act of April 14, 1910, c. 160; the Act of May 30, 1908, c. 225; the Act of February 17, 1911, c. 103; the Act of June 7, 1924, c. 355; and Act of March 4, 1907, c. 2939, entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees thereon," and invalid and void.

6. For the above reasons the Court below erred in ruling and holding that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant, and in entering judgment for the plaintiff.

Statement of Reasons.

The petition in this case asserts the invalidity of the Massachusetts Workmen's Compensation Act, which provides that employers shall insure their employees against injury received in the course of their employment, and, in case they do not do so, subjects them to actions at common law without the benefit of the defenses of assumption of the risk, contributory negligence, and negligence of a fellow servant. This act was construed by the Supreme Judicial Court of Massachusetts to require railroads engaged in both interstate and intrastate commerce to insure its employees to the extent that they are engaged in intrastate commerce (r. p. 40), and as so construed was held not to burden interstate commerce or violate the Commerce Clause of the Federal Constitution (Opinion of Supreme Court, r. pp. 39-40).

The reasons in terms assigned in the petition for the allowance of the writ are that the state statute as construed constitutes a burden upon interstate commerce in violation of the Commerce Clause of the Federal Constitution, and that the defenses of contributory negligence, assumption of the risk, and negligence of a fellow servant were open to the defendant at the trial (Petition, pp. 7-9).

The specification of errors in the supporting brief alleges error in the rulings of the Court below that the statute does not violate the Commerce Clause of the Constitution, and that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant, and in entering judgment for the plaintiff (Supporting Brief, pp. 5, 6).

This Court has held that, where Congress has legislated with respect to the rights and remedies of employees engaged in interstate commerce, the operation of state laws is excluded, even in cases where the employee is also by the same act engaged in intrastate commerce—

New York Central R.R. v. *Winfield,* 244 U.S. 147—

and that where an employee is injured by reason of a violation of the so-called Federal Safety Appliance Act his rights and remedies are governed by that act even although he is engaged exclusively in intrastate commerce.

Texas & Pacific Ry. Co. v. *Rigsby,* 241 U.S. 33.

While it is believed that, under the petition as it stands, all questions as to the validity of the state statute by reason of its effect upon interstate commerce in view of existing laws of Congress enacted pursuant to its power under the Commerce Clause are open, and that the petitioner is not limited to the contention that the statute is unconstitutional by reason of conflict with the Commerce Clause itself, irrespective of such existing laws of Congress, yet the petitioner has in mind the statements of this Court that, on certiorari, it will at the argument feel called upon to consider only the grounds presented in the petition.

The petitioner therefore desires to amend the petition as requested, so that upon the argument the question as to the validity of the state statute, in view of such existing laws of

Congress and the contention that it is invalid by reason of conflict therewith, may be open beyond question.

While in the Court below the petitioner did not in terms request rulings that the Compensation Act violated the various acts of Congress referred to in the motion, yet the decision of the Supreme Court of the State that the state statute was not in conflict with Federal statutes enacted under regulatory power of Congress was essential to the judgment rendered and the Court referred to the Federal Employers' Liability Act and its operation (Opinion Supreme Court, r. pp. 32, 33), and apparently dealt with the case in the light of existing laws of Congress.

Chambers v. *Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148.
Hare v. *Rice*, 204 U.S. 291, 299.
Cissna v. *Tennessee*, 246 U.S. 289, 293.

Respectfully submitted,
PHILIP N. JONES,
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Supreme Court of the United States.

October Term, 1931.

No. 477.

Boston and Maine Railroad,
Petitioner,

v.

Fred Armburg,
Respondent.

On Writ of Certiorari to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts.

BRIEF FOR PETITIONER.

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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
PETITIONER,
v.
FRED ARMBURG,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

BRIEF FOR PETITIONER.

GENERAL STATEMENT.

This case comes before this Court upon a writ of certiorari to the Municipal Court of the City of Boston of the State of Massachusetts, petition for which was granted November 2, 1931 (r. p. 43).

The cause to be reviewed is an action of tort for personal injuries, wherein judgment was rendered by the Municipal Court of the City of Boston in favor of the respondent, the plaintiff below, against the petitioner, the defendant below.

The questions involved are as to the constitutionality and validity, under the Commerce Clause of the Federal

Constitution, of the Massachusetts Workmen's Compensation Law, Massachusetts General Laws, c. 152, and certain parts thereof, in their application to the petitioner, a railroad corporation engaged in both interstate and intrastate commerce.

The petitioner and the respondent are herein respectively referred to as the defendant and the plaintiff.

The case was tried before a justice of the Municipal Court of the City of Boston, who made findings of fact and rulings of law, found for the plaintiff and reported his rulings to the Appellate Division of that Court (f. pp. 25, 26).

The Appellate Division dismissed the report, and the defendant appealed from the order of dismissal to the Supreme Judicial Court of the State, which affirmed that order (r. p. 31), and the Municipal Court thereupon entered judgment for the plaintiff on its finding (r. p. 3).

Opinions of the Courts Below.

The opinion of the Supreme Judicial Court of Massachusetts was rendered September 12, 1931, and is reported in Mass. Adv. Sheets, 1931, p. 1751, under the title "*Armburg* v. *Boston and Maine Railroad.*" It is included at page 31 of the record. The opinion of the Appellate Division of the Municipal Court of the City of Boston is not reported. It is included at page 28 of the record.

Jurisdiction.

Jurisdiction to review this cause exists under Judicial Code, sec. 237 (*b*), as amended by Act of February 13, 1925, c. 229, sec. 1; 43 Stat. 937, whereby this Court is authorized by certiorari to review any cause "where is drawn in question the validity of a statute of any State on the ground

of its being repugnant to the Constitution, treaties, or laws of the United States."

The date of entry of the judgment in the cause sought to be reviewed was September 25, 1931 (r. p. 3). The judgment was rendered by the Municipal Court of the City of Boston, the highest court of the State in which a decision in said cause could be had.

The order granting the petition for a writ of certiorari was entered November 2, 1931 (r. p. 43).

A. The Massachusetts Workmen's Compensation Act.

The statute, the validity of which is drawn in question, is the Massachusetts Workmen's Compensation Act, so called, now comprising Massachusetts General Laws, c. 152, (Appendix, p. 63) and section 66 thereof (Appendix, p. 85).

The law was originally enacted as Massachusetts Acts 1911, c. 751, entitled "An Act relative to payments to employees for personal injuries received in the course of their employment and to the prevention of such injuries," and section 66 above referred to appeared in the original enactment as part 1, section 1, of that chapter.

General Laws, c. 152, entitled "Workmen's Compensation," comprising the Act as constituted, including amendments, at the time of the plaintiff's injury, July 8, 1929, is, except for sections which can have no possible bearing upon the questions involved, set forth in the Appendix (pp. 63-86, *infra*).

For convenience and brevity, chapter 152 is hereinafter referred to as the Act.

The Act comprises a system whereunder compensation of employees for injuries received in the course of their employment is secured and paid by means of insurance effected by their employers referred to in the Act as "insured persons" (sec. 1; Appendix, p. 66). We will endeavor

to state the general frame of the Act as concisely as possible.

Insurance companies, referred to as insurers (sec. 1; Appendix, p. 66) generally are authorized to insure payment of the compensation and to classify risks and premiums, subject to the approval of the Commissioner of Insurance, whose decision is subject to review by the Supreme Judicial Court (sec. 52; Appendix, p. 83, *infra*). The right to compensation under such insurance does not depend upon fault in the employer or absence of fault in the employee, but is absolute except in case of the employee's serious and wilful misconduct (secs. 26, 27; Appendix, p. 76), and the compensation is paid in weekly instalments, the duration whereof is in general regulated by the length of total or partial incapacity of the employee and the amount thereof by his earning capacity (secs. 29-31, inclusive, 34, 35; Appendix, pp. 76-79, *infra*). In event of certain specified injuries additional payments are provided for (sec. 36; Appendix, p. 79, *infra*).

In case the injury is due to the serious and wilful misconduct of the employer, or one exercising the powers of superintendence, double compensation is awarded.

> "In such case the insured shall repay to the insurer the extra compensation paid to the employee" (sec. 28; Appendix, p. 76, *infra*).

In case the employer does not insure, he is, by the following quoted sections, deprived of the common-law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant in an action by the employee.

> "Section 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence—
>
> "1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury.

"Section 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person" (Appendix, pp. 85-86, *infra*).

By sections 21 and 22 (Appendix, p. 74, *infra*), insured persons, upon securing their policies, are required to give notice to employees or to those about to enter their employ that they have provided for payment to injured employees by the insurer, and employers discontinuing insurance must give notice thereof to their employees.

Employees are not obliged to accept insurance in lieu of legal remedies, but by section 24 (Appendix, p. 75, *infra*), it is provided as follows:

"Section 24. An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. . . ."

Employees thus reserving their common-law rights are, by section 68 (Appendix, p. 86), excluded from the operation of the State Employers' Liability Act, General Laws, c. 153 (Appendix, p. 86), which gives rights of action thereunder in certain cases involving the negligence of superin-

tendents and certain other employees in positions of authority.

> "Section 68. Chapter one hundred and fifty-three and sections four and seven to ten, inclusive, of chapter two hundred and twenty-nine shall not apply to employees of an insured person, nor to laborers, workmen or mechanics employed by any county, city, town or district subject to sections sixty-nine to seventy-five, inclusive, while this chapter is in effect."

As far as injuries occurring in the State are concerned, at least, statutory rights of action may not be reserved under section 24—

> *McDonnell* v. *Berkshire Street Ry. Co.*, 243 Mass. 94—

and the phrase "or under the law of any other jurisdiction in respect to an injury therein occurring" was added by amendment to cover the case of an accident occurring in another State.

> *McLaughlin's Case,* Mass. Adv. Sheets, 1931, p. 243.

An employee who has not reserved his common-law rights under section 24 or who has waived such reservation, who is injured in the course of his employment, is, by section 26 (Appendix, p. 76, *infra*), entitled to compensation from the insurer if his employer is an insured person. In case death results the payments are made to dependents (sec. 31; Appendix, p. 77).

By sections 41, 42, 43 (Appendix, pp. 80-81) it is provided that proceedings for compensation may not be maintained unless the employee gives the insurer or insured reasonable notice of the injury as soon as practicable and makes claim therefor within six months after the injury, with liberal

exceptions to such requirements (sec. 45; Appendix, p. 81).

By section 45 (Appendix, p. 81) an injured employee is obliged to submit to an examination by a physician furnished by the insurer or insured.

Questions and disputes arising under policies of insurance are in the first instance determined by the Department of Industrial Accidents (secs. 7, 8, 16; Appendix, pp. 68, 72), and are subject to review by the Courts on questions of law (sec. 11; Appendix, p. 69).

By section 54 (Appendix, p. 84, *infra*) it is provided:

> "Policies of Workmen's Compensation Insurance issued or delivered in the commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by this chapter, whatever other contingencies may be insured by riders attached thereto or endorsements thereon."

By section 64 (Appendix, p. 85) the insurer is required to make and enforce reasonable rules and regulations for the prevention of injuries on the premises of insured persons, and—

> "for this purpose inspectors of the insurer shall have free access to all such premises during regular working hours."

An employee within the meaning of the Act is defined to be—

> "Every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer" (sec. 1 (4); Appendix, p. 66).

B. The Case and Rulings.

The cause in which the judgment was entered was an action of tort at common law, wherein by his declaration the plaintiff alleged that, while traveling in a motor car over the tracks of the defendant, the motor car was derailed by reason of the negligence of the defendant, its agents and servants, and he received injuries (r. pp. 26, 27).

The defendant set up in its answer *inter alia* that the plaintiff's injuries were due solely to the negligence of a fellow servant, and that the plaintiff assumed the risk of the same (r. p. 27).

The plaintiff made no contention or suggestion of any claim of liability of the defendant under the State Employers' Liability Act, General Laws, c. 153 (Appendix, p. 86), whereunder the damages recoverable are limited to $4000 and notice of injury is a condition of the right (Massachusetts General Laws, c. 153, secs. 5, 6; Appendix, p. 87).

Nor would any such contention have been open under his declaration, which asserted only a common-law cause of action (r. p. 26).

The defendant, at the time of the plaintiff's injury, was a common carrier of goods and passengers for hire and owned or leased railroad tracks which it used in its business. Its tracks extended from point to point within the State of Massachusetts and also from points in Massachusetts to points in Maine, New Hampshire, Vermont, and New York, and it was engaged in the business of transporting both freight and passengers over such tracks from point to point within the State of Massachusetts and from points within that State to points in other States and from points in other States to points in Massachusetts (r. p. 5). It was a railroad corporation engaged in both interstate and intrastate commerce (r. p. 4).

The plaintiff, who was an employee of the defendant (r. p. 5), was not employed in interstate commerce at the time of his injury, but was employed in intrastate commerce

★

It appeared in evidence that the defendant had about 1300 miles of track outside of Massachusetts and about 700 miles inside that state (r. p. 9).

It also appeared in evidence that the defendant carried 23,922,566 tons of freight during the year 1929; that only 15 per cent of its freight business did not involve the use of some other railroad in carrying the freight to its destination (r. p. 20); that of the tonnage carried to connecting carriers, tonnage carried intrastate would amount to a very small proportion, 10 per cent or under (r. p. 21).

It also appeared that the total number of employees of the defendant for the month of July, 1929, was 3971 conductors, firemen, brakemen, and engineers paid on an hourly basis, 15,778 other men paid on an hourly basis, and 2208 men paid on a daily basis (r. p. 14); that the payroll for that month was $411,000 for the men paid on a daily basis, $811,062 for the train and engine service men, and $1,921,971 for the (other) men paid on an hourly basis (r. p. 15).

(r. p. 5). The defendant was not a subscriber under the provisions of the Act (r. p. 5), that is to say, it had not provided by insurance for compensation to its employees, in case of injury.

The defendant requested the trial Court to rule as follows (r. pp. 23-25):

"3. There is no evidence to warrant the Court in finding that the defendant as distinguished from its servants and agents was negligent.

"4. There is no evidence to warrant the Court in finding that any negligence on the part of the defendant as distinguished from its servants and agents was the proximate cause of the injury to the plaintiff.

. . . . . .

"7. The Workmen's Compensation Act, St. 1911, chap. 751, now General Laws, chap. 152, does not apply to a railroad corporation engaged in both intrastate and interstate commerce.

"8. St. 1911, chap. 751, now General Laws, chap. 152, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"9. The defences of contributory negligence, assumption of risk, and that the injury was caused by the negligence of a fellow servant are open to the defendant in this action.

"10. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"11. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"12. As a matter of law Connell was a fellow servant of the plaintiff.

"13. As a matter of law upon all the evidence the employee who was operating the railroad motor car at the time of the accident was a fellow servant of the plaintiff Armburg.

"14. Upon all the evidence the plaintiff is not entitled to recover in this action upon the following grounds and each of them:

"(a) Because upon all the evidence the injury to the plaintiff was caused by the negligence of a fellow servant and the defence that the said injury was so caused is open to the defendant in this action as a matter of law and constitutes a complete defence thereto.

"(b) Because as a matter of law upon all the evidence the plaintiff's injury was caused by the negligence of a fellow servant.

"(c) Because as a matter of law the defence that the injury was caused by the negligence of a fellow servant is open to the defendant in this action.

"(d) Because as a matter of law the Workmen's Compensation Act, St. 1911, chap. 751, now General Laws, chap. 152, does not apply to a railroad corporation engaged in both intrastate and interstate commerce.

"(e) Because as a matter of law St. 1911, chap. 751, now General Laws, chap. 152, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"(f) Because as a matter of law the defendant, which is a railroad corporation engaged in both intra and interstate commerce, falls altogether outside the operation of the Workmen's Compensation Act, St. 1911, chap. 751, now G.L. c. 152.

"(g) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, is

not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"(h) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce."

The trial Court granted requests 3, 4, 12, and 13 and ruled and found that the injuries to the plaintiff were caused by the negligence of a fellow servant, the operator of a railroad motor car upon which the plaintiff was riding, refused all of the other requests, and found for the plaintiff in the amount of $26,500 (r. pp. 25, 26). It reported its rulings to the Appellate Division of the Municipal Court (r. p. 26).

The Appellate Division of the Municipal Court entered an order dismissing the report (r. p. 27).

The Appellate Division in its opinion held that the Act, General Laws, c. 152, applies to a corporation engaged in both interstate and intrastate commerce (r. pp. 28, 29), expressed doubt as to the scope of such inclusion (r. p. 29), said that the instant case was one of purely intrastate concern and regulation, that the defendant in remaining outside of the compensation system did so on the conditions fixed by the Legislature (r. p. 29), and that its reasons, based on the difficulty of conforming its business to the system, were immaterial (r. p. 30).

It further ruled that, even assuming the necessary inclusion for insurance of all employees, the Act did not place an undue burden upon interstate commerce (r. p. 30).

It also expressed the opinion that the Legislature did not intend a present to insurers by requiring insurance upon those upon whose duties and risks there could be no collection (r. p. 30).

The defendant appealed to the Supreme Judicial Court of Massachusetts from the decision of the Appellate Division dismissing the report (r. p. 28).

The Supreme Court of Massachusetts, on September 10, 1931, entered a rescript affirming the order of the Municipal Court dismissing the report (r. p. 31), and the Municipal Court on September 25, 1931, entered judgment for the plaintiff in the sum of $28,893.41 (r. p. 3).

Massachusetts General Laws, c. 231, contains the following provisions with respect to the review of questions of law arising in the Municipal Court of the City of Boston:

> "Sec. 108. There shall be an appellate division of said municipal court for the rehearing of matters of law arising in civil causes therein, . . . Any party to a cause brought in said court after August thirty-first, nineteen hundred and twelve, aggrieved by any ruling on a matter of law by a single justice, may, as of right, have the ruling reported for determination by the appellate division when the cause is otherwise ripe for judgment, or sooner by consent of the justice hearing the same. . . . If the appellate division shall decide that there has been prejudicial error in the ruling complained of, it may reverse, vacate or modify the same or order a new trial in whole or part; otherwise it shall dismiss the report, . . .
>
> "Sec. 109. An appeal shall lie from the final decision of the appellate division to the supreme judicial court for the commonwealth. Claim thereof shall be filed in the office of the clerk of said municipal court within five days after notice of the decision of the appellate division. The appeal shall not remove the cause, but only the question or questions to be determined."

In its opinion in *Armburg* v. *Boston and Maine Railroad*, Mass. Adv. Sheets, 1931, p. 1751; r. p. 31, the Supreme Court dealt with and decided the questions whether the Act is

applicable to the defendant, the extent to which it is applicable, and whether, as construed and applied to the defendant, it imposes an undue burden upon interstate commerce and is in violation of the Commerce Clause, and invalid.

The Court decided and ruled that the jurisdiction of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce; that the Act is applicable to the defendant as to its employees while engaged in intrastate commerce; that the defendant is required to insure its employees to the extent that they are engaged in intrastate commerce and to pay premiums based on that part of its payroll rightly allocated to intrastate commerce; that, if the defendant does not insure in accordance with the provisions of the Act, it cannot interpose the common-law defenses of contributory negligence, assumption of risk, and negligence of fellow servants in actions for personal injuries brought against it by employees engaged in intrastate commerce; that the Act as so construed does not constitute a burden upon interstate commerce, and is not in violation of the Commerce Clause, art. I, sec. 8, of the Constitution of the United States, and is valid.

The above rulings are contained in the following portions of the opinion:

> "The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1754; r. p. 35).

At the conclusion of its discussion as to the application of the Act to a railroad engaged in both classes of commerce, the Court ruled:

> ". . . we think that the Act is applicable to the defendant as to its employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1758; r. p. 38).

It then proceeded to state the defendant's contention:

> "The defendant contends that thus interpreted the act is unconstitutional as applied to the defendant, in that it imposes an undue burden upon interstate commerce contrary to art. I, § 8, of the Constitution of the United States" (Mass. Adv. Sheets, 1931, p. 1758; r. p. 38).

And ruled as follows:

> "The provisions of G.L. c. 152, as herein interpreted, do not in our opinion burden the interstate commerce of the defendant. Whether the defendant shall avail itself of that act is wholly optional with it. If it does not insure in accordance with its provisions, it cannot, in common with all other employers in like situation, interpose the defences of assumption of risk, contributing negligence, or the fellow servant doctrine in actions for personal injury brought against it by its employees engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1759; r. p. 39).

And further, with respect to the validity as well as the construction of the Act, ruled:

> "If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the commissioner of insurance requires that 'Compensation Insurance policies shall not

be written except upon the basis of the entire payroll of the assured which is the subject of Insurance.' As applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts and those, if any, entitled to the benefits of St. 1927, c. 309, §§ 2, 3. That is the only payroll of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce. Such premiums would not be a burden upon interstate commerce. If such insurance would have any effect on interstate commerce, it would be purely incidental and therefore would infringe upon no constitutional inhibitions'' (Mass. Adv. Sheets, 1931, p. 1760; r. p. 40).

C. Argument on Jurisdiction.

There was thus drawn in question, and decided adversely to the defendant, the validity of the Act as applied to the defendant upon the ground of its being repugnant to the Commerce Clause, art. I, sec. 8, of the Constitution of the United States.

While in the Municipal Court no ruling that the Act as a whole was in conflict with the Commerce Clause was in terms requested, it is apparent from the above-quoted portions of its opinion that the Supreme Court assumed that question to be in issue, took cognizance of it, and decided it adversely to the defendant.

Chambers v. *Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148.
Haire v. *Rice*, 204 U.S. 291, 299.
Cissna v. *Tennessee*, 246 U.S. 289, 293.
Mallinckrodt Works v. *St. Louis*, 238 U.S. 41, 49.

Moreover, the defendant specifically requested rulings that section 66 of the Act (Appendix, p. 85) was in viola-

tion of the Commerce Clause if construed as applicable to the defendant (Requests 11, 14*h*, r. pp. 24, 25), and these requests were refused (r. pp. 25, 26).

Under these requests invalidity of other portions of the Act is obviously open in so far as the validity of section 66 may be affected thereby.

The questions raised, considered, and decided as to the conflict of the Act and section 66 with the Commerce Clause include within their scope the effect of the Act of April 22, 1908, c. 149, The Federal Employers' Liability Act, upon the power of the State to enact the legislation in question and its validity in its application to the defendant.

State legislation in such matters affecting interstate commerce as are within the police powers of the states and valid in the absence of action by Congress derives its validity not from any power granted to the states or withheld from Congress under the Commerce Clause, but from the permission of Congress implied from its failure to legislate with respect to the subject-matter. This implied permission ceases to exist when Congress evinces an intention to withdraw such authority.

Second Employers' Liability Cases, 223 U.S. 1, 55.

Texas & Pacific Ry. Co. v. *Rigsby*, 241 U.S. 33, 41.

New York Central R.R. v. *Winfield*, 244 U.S. 147, 148.

Northern Pacific Ry. Co. v. *Washington*, 222 U.S. 370.

Erie R.R. Co. v. *New York*, 233 U.S. 671.

Adams Express Co. v. *Croninger*, 226 U.S. 491, 506.

McDermott v. *Wisconsin*, 228 U.S. 115, 131.

Chicago, R. I. & Pac. Ry. Co. v. *Hardwick Elevator Co.*, 226 U.S. 426, 435.

In *Northern Pacific Ry. Co.* v. *Washington*, 222 U.S. 370, *supra*, in holding, as stated in the headnote:

> "The enactment by Congress of the Hours of Service Law, March 4, 1907, c. 2939, 34 Stat. 1415, was a manifestation by Congress of its intent to bring the subject of hours of labor of employees of interstate carriers under its control; and, although the act did not go into effect for a year after its passage, the various state laws on the subject became inoperative at once on the enactment"—

the Court say, at page 378:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State."

In *Erie R.R. Co.* v. *New York*, 233 U.S. 671, *supra*, it was held, as stated in the headnote:

> "Provisions in the Labor Law of New York of 1907 relating to the hours of service of railroad telegraph operators engaged in interstate commerce are void in so far as they attempt to regulate interstate commerce, as Congress had completely covered the field by the

Hours of Service Act of 1907, although that act did not take effect until March, 1908."

The Court say, at page 681:

"The relative supremacy of the state and National power over interstate commerce need not be commented upon. Where there is conflict the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the State ceases to exist."

In *Chicago, R. I. & Pacific Ry. Co.* v. *Hardwick Elevator Co.*, 226 U.S. 426, *supra*, in holding that, since the enactment of the Hepburn Act of June 29, 1906, c. 3591, concerning deliveries of cars in interstate commerce, it was beyond the power of a State to regulate the delivery of cars for interstate shipments, the Court say, at page 435:

"It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power."

The power to regulate the subject-matter was at all times in Congress by virtue of the Commerce Clause, and the former authority of the States with respect thereto was entirely permissive and resulted from the implication that Congress by inaction had tacitly authorized them to act.

Chicago, R. I. & Pac. Ry. Co. v. *Hardwick Elevator Co.*, 226 U.S. 426, *supra.*

The defendant contends that the effect of the federal Safety Appliance Acts, U.S.C. title 45, c. 1, secs. 1-7, incl., 8, 9, 11-14, incl., 16, 17, and 23 (Appendix, pp. 92-97, *infra*), requiring railroad carriers engaged in commerce to conform to certain regulations as to equipment is also open to the defendant upon the question of conflict of the Act with the Commerce Clause, although the effect of these acts was not considered by the State Court in its opinion, because by their enactment the authority of the states to pass laws affecting the subject-matter of injuries sustained by employees of such carriers, however employed, by reason of their violation, was withdrawn.

Texas & Pacific Ry. Co. v. *Rigsby*, 241 U.S. 33.
San Antonio & Aransas Pass Ry. Co. v. *Wagner*, 241 U.S. 476.

Questions as to the effect of regulatory Federal legislation under the Commerce Clause upon the validity and operation of State statutes are assumed by this Court to involve the validity of such State statutes on the ground of repugnancy to the Commerce Clause, and not merely on the ground of conflict with the regulatory laws of Congress.

Southern Railway Co. v. *Reid*, 222 U.S. 424.
Chicago, R. I. & Pac. Ry. Co. v. *Hardwick Elevator Co.*, 226 U.S. 426, *supra*.

In *Southern Railway Co.* v. *Reid*, *supra*, the plaintiff in the State Court recovered penalties imposed by a State statute for the refusal by a transportation company to accept freight. At page 426 it appears that the question involved, as stated in the railroad's brief, was: "whether the statute is constitutional as applied to interstate commerce."

The railroad's contention was thus stated by the Court, at page 434:

"The railway company resisted the demand and contended that to hold that the act was applicable to it would violate the commerce clause of the Constitution of the United States."

The judgment below was reversed upon the ground that by the Hepburn Act of June 29, 1906, c. 3591, Congress had taken possession of the field of rate making and charging for interstate shipments, and that the power of the States to legislate upon the subject was thereby superseded.

In *Chicago, R. I. & Pac. Railway Co.* v. *Hardwick Elev. Co.*, 226 U.S. 426, *supra*, where in the State court a penalty was imposed under the provisions of a State law for delay in furnishing cars upon demand, the questions raised below are thus stated, at page 427:

"It was also claimed that if the statute in question embraced interstate commerce and was applied to the requisitions for cars referred to in the complaint it would be repugnant to the commerce clause and to the due process and equal protection clauses of the Constitution of the United States. . . . The trial judge refused to give instructions asked for by the railway company embodying the constitutional objections made in its answer."

Before this Court the argument was principally concerned with the question as to the validity of the State statute, as though enacted in the absence of regulatory action by Congress. The Court, however, reversed the judgment below upon the ground as stated in the following passage, at page 433:

"We are not, however, called upon to test the merits of these conflicting contentions, since we are of opinion that by the act of June 29, 1906, 34 Stat. 584, c. 3591, known as the Hepburn Act, amendatory of the act to regulate commerce, Congress has legislated concerning

the deliveries of cars in interstate commerce by carriers subject to the act."

The question, therefore, of the validity of a State statute, because it affects a field occupied by Congress under the Commerce Clause, is involved under a claim of conflict between such State statute and the Commerce Clause.

Furthermore the question of the application of the Act to the defendant was expressly raised by specific requests in the Municipal Court (Requests 7, 8, 10, 14*d*, 14*e*, 14*f*, 14*g*, r. pp. 24, 25; see *supra*, pp. 9-11).

Although those requests did not in terms specify constitutional or federal grounds, the State Supreme Court, in dealing with the case, discussed the effect of the Federal Act upon the validity and operation of State laws with respect to the subject-matter of such a carrier's liability to employees, and by portions of the opinions heretofore quoted ruled that the State Act as construed by it was valid and operative in its application to the defendant (see pages 14, 15, *supra*).

Thus the Court in a statement of principles, which, however, it did not follow in its rulings as to the application of the State Act and its validity, discussed the effect of the Federal Act:

> "At the outset it is to be observed as the basis of this opinion that the act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce. It was said in *Seaboard Air Line* v. *Horton*, 233 U.S. 492, at 501: 'it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employés in interstate transportation by rail, all state laws upon the subject are superseded. *Second Employers' Liability Cases*, 223 U.S. 1, 55.' That statement applies also to all State laws thereafter enacted; they are void in their application to the subject of

interstate commerce, no matter how phrased." (Mass. Adv. Sheets, 1931, p. 1752; r. pp. 32, 33).

Later in the opinion, where it ruled, without qualification, that—

> "The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, pp. 1754, 1755; r. p. 35)—

it cites and quotes from decisions of this Court relative to the operation and application of State laws and the Federal Act, and says:

> "There are numerous cases where decisions of State courts have been reversed because recovery had been allowed under workmen's compensation laws when, as the United States Supreme Court held, the injury had occurred while the employee was engaged in interstate commerce and where, therefore, the State laws were inapplicable and the Federal Employers' Liability Act governed the rights and liabilities of the parties" (Mass. Adv. Sheets, 1931, p. 1755; r. p. 35).

These portions of the opinion are referred to in this connection at this point merely for the purpose of pointing out that the State Court, in making its decision and rulings, had under consideration the effect and operation of the Federal Act, and that the question of its effect upon the State Act was within the scope of its decision.

Moreover the validity of the Act was also drawn in question by reason of the finding of the trial Court that the plaintiff's injuries were caused by the negligence of a fellow servant, and the acceptance of such findings by the Supreme Court in its decision (Mass. Adv. Sheets, 1931, p. 1752; r. p. 32), and the rulings of both the trial Court and the

Supreme Court that that defense of negligence of a fellow servant was not open to the defendant.

The validity and effect of the Act as applied to the defendant was necessarily involved in the decision, and the ruling that the defense of negligence of a fellow servant was not open to the defendant could not have been made, and judgment for the plaintiff could not have been rendered, without deciding those questions adversely to the defendant.

Willson v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, 250.

Craig v. *Missouri*, 4 Pet. 410, 429.

Murray v. *Charleston*, 96 U.S. 432, 444.

Kaukauna Water Power Co. v. *Green Bay &c. Co.*, 142 U.S. 254, 269.

Columbia Water Power Co. v. *Columbia Electric &c. Co.*, 172 U.S. 475, 488.

Williams v. *Bruffy*, 96 U.S. 176, 183.

Manhattan Life Ins. Co. v. *Cohen*, 234 U.S. 123, 134.

Yazoo & Mississippi Valley Ry. Co. v. *Adams*, 180 U.S. 1, 14.

In *Kaukauna Water Power Co.* v. *Green Bay &c. Co.*, 142 U.S. 254, *supra*, the Court say, at page 269:

> "This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court."

In *Yazoo & Mississippi Valley Ry. Co.* v. *Adams*, 180 U.S. 1, 14, *supra*, the Court say, at page 14:

> "'In short, the case is one of those frequently arising under the second clause of Rev. Stat. section 709, in

which the validity of a state statute under the Constitution of the United States is necessarily drawn in question, and the decision of the state court being in favor of its validity, this court will take jurisdiction, though the Federal question be not specially set up or claimed."

At page 15:

"And the fact that the Supreme Court of the State did not expressly refer to the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision."

In *Columbia Water Power Co.* v. *Columbia Electric &c. Co.*, 172 U.S. 475, *supra*, the Court say, at page 489:

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."

In *Manhattan Life Insurance Co.* v. *Cohen*, 234 U.S. 123, *supra*, the Court say, at page 134:

"Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the full faith and credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been

expressly asserted below (see *Tilt* v. *Kelsey*, 207 U.S. 43, 51); the right to review under such condition being in effect but a result of the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided."

Statement of the Case.

The case has been stated under the heading "Jurisdiction" (p. 2, *supra*).

Specification of Errors.

1. The Court below erred in ruling and holding that Massachusetts General Laws, c. 152, and sec. 66 thereof, requiring railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in intrastate commerce, or be subject to actions at common law without the benefit of the common-law defenses of negligence of fellow servants, assumption of the risk, and contributory negligence are not in violation of the Commerce Clause, art. I, sec. 8, of the Constitution of the United States and void, and that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant.

2. The Court below erred in ruling and holding that Massachusetts General Laws, c. 152, and sec. 66 thereof, requiring railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in intrastate commerce, or be subject to actions at common law without the benefit of the common-law defenses of negligence of fellow servants, assumption of the risk, and contributory negligence, are not in violation of the Commerce Clause, art. I, sec. 8, of the Constitution of the United States and void.

3. For the above reasons the Court below erred in ruling and holding that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant, and in entering judgment for the plaintiff.

Summary of Argument.

1.

State laws, though not purporting to operate upon interstate commerce, are in violation of the Commerce Clause and invalid if they burden interstate commerce or affect fields of legislation occupied by Congress by virtue of its power under the Commerce Clause.

2.

The relation of the interstate and intrastate commerce of railroads engaged in both, and the nature of the services of their employees, are such that the provisions of Massachusetts General Laws, c. 152, relative to insurance of employees, construed by the State Court to apply to the defendant as to its employees while engaged in intrastate commerce and to require the defendant to insure its employees to the extent that they are engaged in intrastate commerce, impose a burden upon interstate commerce, affect fields of legislation occupied by Congress by virtue of its power under the Commerce Clause, are in conflict with the Commerce Clause, and are invalid.

3.

The provisions of Massachusetts General Laws, c. 152, relative to insurance of employees, being unconstitutional and invalid as applied to the defendant, sections 66 and 67 thereof, in effect providing that in case of failure of an employer to insure its employees in accordance with its provisions, such employer is not entitled to the benefit of the

common-law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant are unconstitutional and invalid as applied to the defendant, and those defenses were open to the defendant at the trial.

ARGUMENT.

1.

State laws, though not purporting to operate upon interstate commerce, are in violation of the Commerce Clause and invalid if they burden interstate commerce or affect fields of legislation occupied by Congress by virtue of its power under the Commerce Clause.

Under the Commerce Clause the power to regulate interstate commerce is conferred exclusively upon Congress, and includes the regulation of all matter incidental to the control, advancement, and protection of interstate commerce and the agencies thereof, including the regulation and control of intrastate commerce to the extent necessary or appropriate.

Southern Ry. Co. v. *United States,* 222 U.S. 20, 27.
Minnesota Rate Cases, 230 U.S. 352, 399.
Houston & Texas Ry. Co. v. *United States,* 234 U.S. 342, 351, 353.
Baltimore & Ohio R.R. Co. v. *Interstate Commerce Commission,* 221 U.S. 612, 618.
Illinois Central R.R. Co. v. *Behrens,* 233 U.S. 473, 477.
Northern Pacific Ry. Co. v. *Washington,* 222 U.S. 370.

State laws which, either directly or by their necessary operation, tax, burden, or interfere with interstate commerce

are invalid, no matter how expressed and regardless of the purpose for which they are enacted.

New Jersey Tel. Co. v. *Tax Board,* 280 U.S. 338, 346.
International Paper Co. v. *Massachusetts,* 246 U.S. 135, 141.
Lemke v. *Farmers' Grain Co.,* 258 U.S. 50, 59.
Alpha Cement Co. v. *Massachusetts,* 268 U.S. 203, 218.
Di Santo v. *Pennsylvania,* 273 U.S. 34, 37.

The power of Congress under the Commerce Clause to regulate interstate commerce and intrastate commerce where regulation of the latter is incidental to regulation of the former is paramount and excludes the right of control and regulation thereof by the States.

Minnesota Rate Cases, 230 U.S. 352, 399.
Erie R.R. Co. v. *New York,* 233 U.S. 671, 681, 682.
McDermott v. *Wisconsin,* 228 U.S. 115, 131.
Northern Pacific Ry. Co. v. *Washington,* 222 U.S. 370, 378.
Southern Ry. Co. v. *Reid,* 222 U.S. 424, 436.
Chicago, R. I. & Pac. Ry. Co. v. *Hardwick Elevator Co.,* 226 U.S. 426, 435.
Houston, East & West Texas Ry. Co. v. *United States,* 234 U.S. 342, 351.
Texas & Pacific Ry. Co. v. *Rigsby,* 241 U.S. 33.
San Antonio & Aransas Pass Ry. Co. v. *Wagner,* 241 U.S. 476.

State legislation upon certain matters said to be within the police powers of the States and held to be valid in the absence of action by Congress, although it may affect matters within the regulatory power of Congress, derives its validity not from any power granted to the States or withheld from

Congress under the Commerce Clause, but from the permission of Congress implied from its failure to legislate with respect to the subject-matter. This implied permission and the validity of such legislation ceases to exist when Congress acts.

Adams Express Co. v. *Croninger*, 226 U.S. 491, 506.
Erie Railroad v. *New York*, 233 U.S. 671, 682.
Chicago, Rock Island & Pacific Ry. Co. v. *Hardwick Elevator Co.*, 226 U.S. 426, 435.
Reid v. *Colorado*, 187 U.S. 137, 146.
Northern Pacific Ry. Co. v. *Washington*, 222 U.S. 370, 378.
McDermott v. *Wisconsin*, 228 U.S. 115, 131.
Mondou v. *N.Y., N.H. & H. R.R. Co.*, 223 U.S. 1, 55.

2.

The relation of the interstate and intrastate commerce of railroads engaged in both, and the nature of the services of their employees, are such that the provisions of Massachusetts General Laws, c. 152, relative to insurance of employees, construed by the State Court to apply to the defendant as to its employees while engaged in intrastate commerce and to require the defendant to insure its employees to the extent that they are engaged in intrastate commerce, impose a burden upon interstate commerce, affect fields of legislation occupied by Congress by virtue of its power under the Commerce Clause, are in conflict with the Commerce Clause, and are invalid.

It is a matter of common knowledge that in the operation of a railroad engaged in both interstate and intrastate traffic, the two kinds of traffic are to a great extent carried on by the same employees; that the two kinds of traffic and the services of employees engaged in the same are to a

great extent so commingled as to be inseverable and indivisible, so that whatever affects intrastate commerce and the rights of employees engaged therein necessarily affects interstate commerce.

To this extent the power of Congress under the Commerce Clause is paramount and exclusive over intrastate commerce, and in those fields in which Congress has manifested an intention to assume control, State laws, although they may purport to operate upon intrastate commerce, are in violation of the Commerce Clause and invalid.

The Minnesota Rate Cases, 230 U.S. 352.
Houston & Texas Ry. v. *United States*, 234 U.S. 342.
Northern Pacific Ry. v. *Washington*, 222 U.S. 370.
Baltimore & Ohio R.R. Co. v. *Interstate Commerce Commission*, 221 U.S. 612.
Southern Ry. Co. v. *United States*, 222 U.S. 20.
Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U.S. 194.

In the *Minnesota Rate Cases*, 230 U.S. 352, *supra*, in speaking of the power of Congress under the Commerce Clause, the Court say, at page 399:

> "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited

by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In *Houston & Texas Railway* v. *United States*, 234 U.S. 342, *supra*, in holding that under the Act to Regulate Commerce, Act Feb. 4, 1887, c. 104, the Interstate Commerce Commission had power to regulate intrastate charges of an interstate carrier to the extent necessary to prevent discrimination against interstate traffic, the Court say, at page 351:

". . . Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic . . .

"The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

In *Northern Pacific Railway* v. *Washington*, 222 U.S. 370, in holding that the provisions of the Federal Hours

of Service Act, regulating the hours of labor of railway employees engaged in interstate commerce, applied to employees on a train hauling freight from a point outside the State to a point within the State, although it also carried local freight, and that State laws upon the subject could have no application, the Court say, at page 375:

> "In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."

In *Baltimore & Ohio R.R.* v. *Interstate Commerce Commission,* 221 U.S. 612, *supra,* in holding that the above statute was not unconstitutional because, in view of the nature of the road's business, it applied to employees engaged in intrastate commerce, the Court say, at page 618:

> "But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employés in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employés who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.
>
> "This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them."

At page 619:

> "If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employés engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

In *Southern Railway Co.* v. *United States*, 222 U.S. 20, *supra*, in holding that the federal Safety Appliance Acts applied to all cars used on highways of interstate commerce, and in such application was within the power of Congress under the Commerce Clause, the Court say, at page 27:

> ". . ., it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.
>
> "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employés, for they usually, if not necessarily, have to do with both classes of traffic."

Congress, by the Federal Employers' Liability Act (Appendix, p. 90), having asserted its paramount power over the subject of the liabilities of interstate carriers for injuries to their employees while engaged in interstate commerce, the right of the States to affect the subject-matter is excluded.

Furnishing illustrations of the application of the foregoing principles are those decisions which hold that State laws cannot affect the rights and remedies of employees of such carriers for injuries received while employed in intrastate commerce, if the employment also affects interstate commerce.

Pedersen v. *Delaware, Lackawanna & Western R.R.*, 229 U.S. 146.
Erie Railroad Co. v. *Winfield*, 244 U.S. 170.
Southern Pacific Ry. Co. v. *Industrial Accident Commission*, 251 U.S. 259.

In *Pedersen* v. *Delaware, Lackawanna & Western R.R.*, 229 U.S. 146, *supra*, it was held that an employee engaged in the work of maintaining tracks, bridges, engines, or cars in proper condition during their use as instrumentalities of both interstate and intrastate commerce, being engaged in interstate commerce is entitled to sue under the Federal Employers' Liability Act, and the Court say, at page 152:

> "True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

In *Erie Railroad Co.* v. *Winfield*, 244 U.S. 170, *supra*, it was held that recovery could not be had under a State compensation law where the employee was injured while leaving the yard after his day's work in switching both interstate and intrastate commerce.

The Court say, at page 173:

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R.R. Co.* v. *Zachary*, 232 U.S. 248, 260. Like his trip through the

yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance."

In *Southern Pacific Co.* v. *Industrial Accident Commission of California,* 251 U.S. 259, *supra,* an award of the State Industrial Commission under a workmen's compensation law against the railroad was reversed, where it appeared that the employee received a shock while engaged in work upon wires conducting a current which eventually moved cars in both interstate and intrastate traffic.

The Court say, at page 262:

"If such work was part of interstate commerce the Workmen's Compensation Act of the State is inapplicable and the judgment below must be reversed."

And at page 263:

"Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it."

Recent decisions overruling certain prior cases in their definition of the term "commerce"—

Chicago & Northwestern Ry. Co. v. *Bolle,* decided Nov. 23, 1931, 76 L. ed. 90;

Chicago & Eastern Illinois R.R. Co. v. *Industrial Commission,* decided Jan. 4, 1932, 76 L. ed. 204—

do not, of course, affect this principle.

Moreover, the subject-matter of the rights, remedies, and liabilities of interstate carriers, for injuries received by employees even where their employment is exclusively in intrastate commerce, is not a matter as to which State laws have power to legislate in its entirety.

The so-called Safety Appliance Acts require carriers engaged in commerce to equip their cars and locomotives with various designated appliances designed to insure the safety of employees and passengers.

U.S.C. title 45, c. 1, secs. 1-7, incl.; Act March 2, 1893, c. 196, secs. 1, 2, 4, 5, 8 (Appendix, pp. 92-93, *infra*).

U.S.C. title 45, c. 1, secs. 8, 9; Act March 2, 1903, c. 976, secs. 1, 2 (Appendix, p. 94, *infra*).

U.S.C. title 45, c. 1, secs. 11-14, 16; Act April 14, 1910, c. 160, secs. 1, 2, 3, 4, 5 (Appendix, pp. 95-96, *infra*).

U.S.C. title 45, c. 1, sec. 17; Act May 30, 1908, c. 225, secs. 1, 2 (Appendix, p. 97, *infra*).

U.S.C. title 45, c. 1, sec. 23; Act June 7, 1924, c. 355, sec. 2 (Appendix, p. 97, *infra*).

By these enactments the entire subject-matter of the carrier's liability to employees by reason of injuries sustained by them because of disregard of the regulations contained therein, including injuries received by employees engaged exclusively in intrastate commerce, is taken over by Congress, the implication of any authority to the States to deal with the subject-matter is excluded, and all State legislation with respect thereto is in violation of the Commerce Clause and invalid.

Recognition of the foregoing principles and their bearing is found in the following provisions of the New York Compensation Law:

Consolidated Laws of New York, chapter 67, as amended by chapter 615 of the Laws of 1922:

"§ 113. The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

Texas & Pacific Ry. Co. v. *Rigsby,* 241 U.S. 33.
San Antonio & Aransas Pass Ry. Co. v. *Wagner,* 241 U.S. 476.

In *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U.S. 33, *supra,* it was held in part, as stated in the headnote:

> "An employee of a railroad company has a right of action against the company for damages sustained by reason of defective appliances in violation of the Safety Appliance Act even though he was engaged at the time in intrastate, and not interstate, commerce."

The Court say, at page 41:

> "Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded."

The bearing of the Safety Appliance Acts was not dealt with by the State Supreme Court, but the defendant contends that the bearing of these acts is open to argument and consideration by reason of the rulings that the Act is not in conflict with the Commerce Clause, because, as is argued *supra,* page 16 *et seq.,* the right of the State to act in any field within the power of Congress thereunder depends upon the implication of authority from Congress. The defendant submits its argument in this connection only in case the Court considers it open.

It follows from the principles which we have been considering that State laws cannot consistently with the Commerce Clause, by regulation of the rights of employees engaged in intrastate commerce, affect interstate commerce or the rights and remedies of employees engaged therein and the corresponding liabilities and obligations of the railroads.

Furthermore, they are even powerless to affect the rights and remedies, in certain fields, of employees engaged exclusively in intrastate commerce.

But the State Supreme Court decided and ruled, without qualification, that the Act applies to the defendant as to its employees while employed in intrastate commerce, requires it to insure its employees to the extent that they are employed in intrastate commerce, and to pay premiums based upon that part of its payroll rightly allocated to intrastate commerce.

In case the defendant does not comply with these requirements the Act, by sections 66 and 67 (Appendix, pp. 85-86), takes away the common-law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant. The Act as so construed was by the State Court held not to burden interstate commerce or conflict with the Commerce Clause, and to be valid in its application to the defendant.

We here discuss the opinion and decision of the State Court in these connections:

Although the Court at the outset made a statement of principles which was correct in so far as it went, it did not apply those principles in its specific rulings and ultimate decision. This statement, with which it commenced its discussion, was as follows:

> "At the outset it is to be observed as the basis of this opinion that the act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce. It was said in *Seaboard Air Line* v. *Horton,* 233 U.S. 492, at 501: 'it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employés in interstate transportation by rail, all state laws upon the subject are superseded. *Second Employers' Liability Cases,* 223 U.S. 1, 55.' That statement applies also to all State laws thereafter enacted; they are void in their application to the subject of interstate commerce, no matter how phrased" (Mass. Adv. Sheets, 1931, p. 1752; r. pp. 32, 33).

Thus the Court said in effect that, in view of the Federal Act, the State Act can have no valid application to the defendant's interstate commerce or to its employees while engaged therein.

The Court failed to apply these principles in its ultimate rulings and decision, but, as appears from the following portions of the opinion, measured the defendant's obligation to insure by the extent of its employees' services in intrastate commerce, and its obligation to pay premiums by the proportion of time spent therein, though recognizing to an extent the impossibility of classifying the employees between those engaged in interstate commerce and those engaged in intrastate commerce or of separating the two kinds of traffic, and held the Act as so construed to be valid.

In its discussion of the question of the application of the Act, having reached a conclusion that it was intended to be applicable to all classes of injuries "within the competency of the legislative department" (Mass. Adv. Sheets, 1931, p. 1754; r. p. 34), it ruled, as to the extent of that jurisdiction, as follows:

> "The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1754; r. p. 35)—

thus including within the power of the State jurisdiction of all injuries to employees while engaged in intrastate commerce, regardless of the relation of that commerce or such employment to interstate commerce or employment, and plainly covering cases of injury received by employees while performing both interstate and intrastate service, and making the State and not the Nation supreme wherever the services of the injured employee affect both classes of traffic.

This principle was applied in its rulings and decision upon the application of the Act to the defendant, the Court ruling, without qualification:

". . . the act is applicable to the defendant as to its employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1758; r. p. 38).

Thereafter, after stating the defendant's contention—

"that thus interpreted the Act is unconstitutional as applied to the defendant, in that it imposes an undue burden upon interstate commerce contrary to art. I, sec. 8, of the Constitution of the United States" (Mass. Adv. Sheets, 1931, p. 1758; r. p. 38)—

it ruled:

"The provisions of G.L. c. 152, as herein interpreted, do not in our opinion burden the interstate commerce of the defendant" (Mass. Adv. Sheets, 1931, p. 1759; r. p. 39);

and thereafter, dealing further wth the construction of the Act and its constitutionality under the Commerce Clause, it ruled as follows:

"If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the commissioner of insurance requires that 'Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance.' As applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts and those, if any, entitled to the benefits of St. 1927, c. 309, §§ 2, 3. That is the only payroll

> of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce. Such premiums would not be a burden upon interstate commerce. If such insurance would have any effect on interstate commerce, it would be purely incidental and therefore would infringe upon no constitutional inhibitions" (Mass. Adv. Sheets, 1931, p. 1760; r. p. 40).

The statement in the first sentence of the quoted passage, that the defendant "need not insure its employees to the extent that they are engaged in interstate commerce," means only that it need not insure the interstate aspects of its employees' service as such. It does not purport to limit the defendant's obligation to insure its employees to the extent that they are employed in intrastate commerce, including those whose employment by the same acts affects interstate commerce, and it is followed by the statement that the defendant can gain all advantages arising from the Act by "confining its insurance strictly to its employees to the extent that they are engaged in intrastate commerce;" that "the defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on that part of its payroll rightly allocated to intrastate commerce," and that "this may be ascertained by determining the number of hours of employees spent in intrastate commerce."

The Court further indicated the requirement of insurance to the full extent of employment in intrastate commerce by the following reference to the possibility of separating the two kinds of traffic and classifying the employees, and by its statement that a reasonably accurate estimate of the time spent in each is sufficient:

> "It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to in-

dicate that reasonably accurate estimates of the proportion of time of employees spent in intrastate and interstate commerce cannot be made" (Mass. Adv. Sheets, 1931, p. 1757; r. p. 37).

The Act as construed, therefore, applies to the defendant to the extent that its employees are employed in intrastate commerce, without excepting those also employed in interstate commerce, and requires the defendant to insure them to the extent that they are employed in intrastate commerce, without excepting such employment also affecting interstate commerce, and to pay premiums based on their time spent in intrastate commerce, without excepting such of that time as is also spent in interstate commerce.

(a) *The Act is invalid because it affects interstate commerce in fields occupied by Congress and from which the power of the states to legislate is excluded.*

This follows from the occupancy by Congress by the Federal Employers' Liability Act of the field of legislation affecting injuries received by employees of railroads while employed in interstate commerce, the relation between the interstate and intrastate commerce of the railroads and the services of their employees therein, and the paramount nature of the power of Congress over intrastate commerce where incidental to its authority over interstate commerce.

See authorities, pages 27-35, *supra*.

The services of a carrier's employees, as a matter of common knowledge, are largely indivisible as between the two classes of commerce. To that extent whatever affects the rights and remedies of employees engaged in intrastate commerce affects interstate commerce and the rights of employees engaged therein and the corresponding rights, liabilities, and obligations of the railroad.

The application of the Act to the defendant as to its employees while employed in intrastate commerce, the require-

ment of insurance of those employees to the extent that they are engaged in intrastate commerce, and the payment of premiums based upon that part of the defendant's payroll rightly allocated to intrastate commerce, obviously cannot be met without affecting interstate commerce and insuring employees with respect to injuries received while engaged therein.

To the extent that a railroad's employees engaged in intrastate commerce are also engaged in interstate commerce, the authority of the Federal Employers' Liability Act is exclusive and State legislation is invalid.

See authorities, pages 33-35, *supra.*

Otherwise the laws of the States would be supreme within the national field.

Houston & Texas Railway v. *United States*, 234 U.S. 342, 351.

And the State by the Act in question would be enabled to a great extent to withdraw, from the operation of the Federal Act and the jurisdiction of Congress, authority over rights and remedies of employees injured while employed in interstate commerce and to bring the subject-matter within the State's system of workmen's compensation.

The State Court failed to give effect to the exclusive nature of the power of Congress under the Commerce Clause, and to the relation of the two kinds of traffic, one to another, and the services of a carrier's employees therein.

It likewise in great measure treated the case as though the question involved was the possibility of determining whether a particular injury arises out of intrastate or interstate traffic.

In discussing the bearing of the two classes of traffic upon the questions involved, the Court say:

"It is often a question of difficulty whether a particular injury arose out of intrastate or interstate com-

merce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business. There are differences in certain instances as to the persons entitled to recovery and the persons to whom the amount recovered may ultimately be payable under the Federal Employers' Liability Act and under the workmen's compensation act. These and other differences appear to us to constitute merely difficulties of a kind not infrequently [fol. 40] encountered in the practical administration of affairs, but not to amount to insurmountable obstacles in the way of construing the scope of the statute according to its words and purpose" (Mass. Adv. Sheets, 1931, p. 1756; r. p. 37).

The Court thus, to an extent, recognizes difficulties in the determination in a given case as to whether an injury arises out of intrastate or interstate commerce, and holds such difficulties not insurmountable.

But this of course is entirely beside the point. The question is not the usual one (of necessity involved in every case of injury to an employee of a railroad), whether in a given instance the employee was or was not employed in interstate commerce, as determinative of whether recovery is under a State law or the Federal Act.

In such cases the question, though of course sometimes difficult, is always possible of determination.

The question involved here is as to the validity of a requirement that a carrier insure its employees to the extent that they are employed in intrastate commerce, in the light of the interrelation of the two classes of commerce and the services of its employees as to each, and in the light of the paramount authority of Congress, whose exclusive jurisdiction cannot be affected by State laws. It is not solved by

the possibility of determining in case of injury whether the Federal or State law is controlling.

The Court also say, in the same connection:

> "The same employees may be engaged alternately during stated periods in intrastate and in interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to indicate that reasonably accurate estimates of the proportion of time of employees spent in intrastate and interstate commerce cannot be made. The contrary cannot be assumed in the absence of proof. It may be troublesome for the defendant to establish a basis for the insurance of the portion of its employees engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1757; r. p. 37).

Here again the Court assumes a possibility of estimating the proportion of the time of employees spent in intrastate commerce as a "basis for the insurance of the portion of its employees engaged in intrastate commerce," and fails to take into consideration either the fact that a great part of that time is also spent in interstate commerce or the bearing and effect thereof.

Moreover, the field of legislation, with respect to injuries sustained by employees by reason of violations by railroads of the federal Safety Appliance Acts (Appendix, p. 92), is exclusively occupied by Congress to the exclusion of the States, irrespective of the nature of the traffic in which the employee is engaged.

See authorities, pages 35-37, *supra*.

The requirements of the State Act plainly cover this entire field.

(*b*) *The insurance requirements of the Act burden interstate commerce.*

The carrier is required to pay premiums based on that part of its payroll rightly allocated to intrastate commerce (Opinion Supreme Court, Mass. Adv. Sheets, 1931, p. 1760; r. p. 40).

These premiums are, of course, in consideration of the insurance of its employees, to the extent that they are employed in intrastate commerce.

It is the scheme of the Act that the employer receives the consideration for his premium by the transformation of his former liability under the law to the liability of the insurance company to pay compensation to an insured employee under section 26 (Appendix, p. 76), and by the operation of section 25 (Appendix, p. 75) to give the employer a right over against the insurer in event of recovery against the employer by an employee who does not come in under the insurance scheme of the Act.

But to a great extent employees engaged in intrastate commerce are also engaged in interstate commerce, and neither the injury nor the liability therefor can be divided or allocated as between the two kinds of traffic.

If an employee is injured while engaged in employment affecting both intrastate and interstate commerce, or is injured by reason of the carrier's violation of the Safety Appliance Act, he is entitled to recover of the carrier under the appropriate Federal Act regardless of the provisions of the State Act or any insurance effected under its terms.

This right of action under the Federal Act is, of course, not affected, not could it be, by the provisions of section 24 (Appendix, p. 75, *infra*), to the effect that if an employee of an insured person does not give his employer written notice that he claims such right he "shall be held to have

waived his right of action at *common law*, or under the law of any other jurisdiction in respect to an injury *therein* occurring." (Italics ours.)

See *McDonnell* v. *Berkshire St. Ry.*, 243 Mass. 94—

holding that before the amendment of section 24, adding the phrase "or under the law of any other jurisdiction in respect to an injury therein occurring," statutory rights of action could not be reserved.

McLaughlin's Case, Mass. Adv. Sheets, 1931, p. 243—

indicating that the above phrase had reference to a right of action for an injury occurring outside the State and refers to territorial jurisdiction.

The carrier, therefore, although it has paid a premium for insurance against injury to its employees to the extent that they are employed in intrastate commerce, is getting no protection where its employees employed in intrastate commerce are also employed in interstate commerce at the time of injury and where, irrespective of such employment, they are injured through violation of the Safety Appliance Acts, because in such cases it is liable to action under the Federal Acts.

It is true that it is provided by section 25 (Appendix, p. 75) that—

> "if an insured person . . . is required by a judgment of a court to pay to an employee any damages on account of personal injury sustained by such employee during the period covered by insurance, the insurer shall pay to the insured the full amount of such judgment and the cost assessed therewith if the insured shall have given the insurer written notice of the bringing of the action in which the judgment was recovered and an opportunity to appear and defend the same."

But this provision manifestly does not apply to judgments in actions under the Federal Act. It was obviously intended to apply only to judgments upon rights of action which are waived if not reserved under section 24, namely, "rights of action at common law or under the law of any other jurisdiction in respect of an injury *therein* occurring" (italics ours), and to afford protection to the employer in case the employee insisted on those rights.

But even if the provision could be held applicable to a judgment under the Federal Act, a right of action against an insurance company, and that conditional upon compliance with the requirements as to notice, is by no means the equivalent of exemption from liability to the employee, which of course the State law is powerless to afford where the employee is engaged in interstate commerce.

The premiums required of the carrier being paid out of its general funds, and being based upon the extent of the employment of its employees in intrastate commerce, and being in consideration of relief from liability for injuries received therein, and the carrier, by reason of the supremacy of the Federal Act, getting no protection in great part from liability for such injuries, the requirement of such premiums constitutes a discrimination against and a burden upon interstate commerce in violation of the Commerce Clause.

An equally fundamental ground of invalidity of the insurance provisions of the Act rests upon the defendant's right not to have its interstate commerce burdened by the State's measure and allocation of the burden to be placed upon each class of commerce.

This reason is applicable even had the Act required the insurance of employees only to the extent of their employment in intrastate commerce exclusively, and not affecting interstate commerce.

Under the Commerce Clause and the Federal Act the burden properly referable to interstate commerce is the

burden arising from injuries to employees while engaged therein, and the burden properly referable to intrastate commerce is the burden arising from injuries to employees while engaged outside of interstate commerce.

The defendant is entitled to have these burdens fall where they are placed by the Commerce Clause and the Federal Act, and to have the allocation of its burden, as between the two classes of traffic, determined and measured in accordance with these principles, and therefore by the actual event as it occurs.

The State is manifestly powerless to affect this right by legislation which measures the burden to be allocated to each kind of commerce in acordance with artificial and arbitrary rules, not in accordance with these principles.

Fargo v. *Hart*, 193 U.S. 490, 502.
Wallace v. *Hines*, 253 U.S. 66, 69.
Union Tank Line Co. v. *Wright*, 249 U.S. 275.

In *Union Tank Line Co.* v. *Wright, supra*, the State of Georgia assessed a foreign corporation, owning tank cars which were rented by shippers, for those running in and out of Georgia, without regard to and in excess of their real value in an amount bearing the same ratio to the value of all the corporation's personal property as the miles of railroad over which the cars were run in Georgia bore to the total miles over which all the cars were run there and elsewhere.

In holding that, this rule having no necessary relation to the value of the cars in Georgia, the tax was void under the Commerce Clause and the Fourteenth Amendment, the Court say, at page 283:

> "We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

And at page 286:

> ". . . Taxes must follow realities, not mere deductions from inadequate or irrelevant data."

The Act as construed attempts to accomplish this, however, by providing in effect that that part of the defendant's burden referable to injuries received in intrastate commerce shall be determined, not in accordance with these principles, but by premiums, the amount of which is measured according to a proportion of time spent by employees in intrastate commerce.

The State thus allocates the burdens referable to the two classes of commerce, not as they properly rest under the Commerce Clause and the Federal Act, but by an arbitrary rule established by it which disregards the actual event of the injury, which alone provides the lawful test.

The requirement of payment is not made dependent in fact upon a state of affairs affording the State authority to impose it.

Alpha Cement Co. v. *Massachusetts*, 263 U.S. 203, 219.

A result of the application of the principle established by the Act is shown by an extreme illustration, in which it is supposed that all injuries during the life of a policy should chance to occur in interstate commerce, whereby the defendant would be subject to the burden of liability under the Federal Act and also to the payment of the premium, for which it would receive no return.

Inasmuch as the premiums are paid out of the general funds of the defendant, are in addition to any burden and expense rightly referable to interstate commerce, and are not limited to or measured by any burden properly allocated to intrastate commerce in accordance with principles of allocation valid under the Commerce Clause and the Federal Act, they constitute a burden upon interstate commerce.

The principle involved in the foregoing is quite distinguishable from the ordinary case of recovery under State laws where the employee is not engaged in interstate commerce and the burden necessarily lies where it falls, in accordance with the nature of the traffic in which the employee is in fact engaged at the time of injury.

Moreover, it is manifestly impossible to determine the extent to which a railroad's employees are engaged in intrastate commerce, or the part of its payroll rightly allocated to intrastate commerce, or the number of hours spent in intrastate commerce as required by the Act in the determination of the basis for the payment of premiums (Mass. Adv. Sheets, 1931, p. 1760; r. p. 40).

The extent of the operation of each employee upon each class of traffic must be determined in order that that part of the payroll rightly allocated to intrastate commerce may be ascertained.

The services of train crews daily affect trains consisting of both interstate and intrastate cars. Trains consist of cars carrying both interstate and intrastate freight and passengers. Maintenance of tracks and other instrumentalities and switching operations affect both classes of traffic to an extent impossible to allocate as between the two.

Services of various employees drawing different salaries or wages affect the same items or aspects of traffic in different connections, and services of a given employee may affect a great many items of traffic of each kind.

These are but illustrations, of course, of considerations too numerous to specify or call to mind.

It is under these considerations and conditions that that part of the carrier's payroll rightly allocated to intrastate commerce must be ascertained, in order that the carrier may not pay premiums based in part upon the interstate services of its employees. The Court states that, "Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce" (Mass. Adv.

Sheets, 1931, p. 1760; r. p. 40). But a large portion of the number of hours spent in intrastate commerce is also spent in interstate commerce and the proportion to which such employment affects each must be determined as to each employee.

Had the Act as construed merely required the defendant to insure its employees to the extent that they are employed in intrastate commerce exclusively and unrelated to interstate commerce, the same considerations would have been presented.

The necessity would then have been to determine the proportion of service of each employee affecting intrastate commerce and not also affecting interstate commerce, and the time spent in such service.

In other words, the services affecting intrastate commerce only must be segregated from the services affecting interstate commerce only, and from those affecting both.

It is clear, therefore, that the allocations, indicated by the State Court as sufficient for the protection from burden of the defendant's interstate commerce, are impossible, and interstate commerce is burdened by the imposition of the requirements thereby involved.

In view of the nature of the services of the employees of an interstate railroad, decisions which recognize the possibility of allocating as between the two classes of traffic the value of property used in each and the revenues thereof—

Smith v. *Illinois Bell Tel. Co.*, 282 U.S. 133—

are distinguishable.

3.

The provisions of Massachusetts General Laws, c. 152, relative to insurance of employees, being unconstitutional and invalid as applied to the defendant, sections 66 and 67 thereof, in effect providing that in case of failure of an employer to insure its employees in accordance with its provisions, such employer is not entitled to the benefit of the

common-law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant are unconstitutional and invalid as applied to the defendant, and those defenses were open to the defendant at the trial.

These sections are as follows:

"Section 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence—

"1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury,

"Section 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person" (Appendix, pp. 85-86).

It is apparent that the insurance provisions are a vital and integral part of the general plan of the Act, which was to establish a comprehensive system the purpose of which is to govern the rights and liabilities of employers and employees by means of insurance, in place of the former method whereby their rights and liabilities were left to be determined by the common law as modified by the Employers' Liability Act, Massachusetts General Laws, c. 153; c. 229 (Appendix, pp. 86-89).

By sections 66 and 67 failure to so insure is in effect penalized by the withdrawal of the defenses of assumption of risk, contributory negligence, and negligence of a fellow servant.

The Act was first enacted by Massachusetts Acts 1911, c. 751, entitled "An Act relative to payments to employees for

personal injuries received in the course of their employment and to the prevention of such injuries."

It now comprises the Act under consideration, chapter 152 of the Massachusetts General Laws (the 1920 consolidation of the general statutes of the State), entitled "Workmen's Compensation."

The law as first enacted by the Acts of 1911 was the same in its general scheme and features (with certain differences here immaterial) as is now contained in chapter 152, although the form and arrangement was quite different.

By Part IV of the Act of 1911 a corporation, entitled "The Massachusetts Employees' Insurance Association," was created, and by section 6 of Part IV it was provided that any employer in the Commonwealth might become a subscriber.

These subscribers were, by section 13, required to pay annually "such premiums as may be required to pay the compensation herein provided for the injuries which may occur in that year."

By Part II, sec. 1, employees of subscribers were entitled to be paid their compensation from this association.

> "Section 1. If an employee who has not given notice of his claim of common law rights of action, as provided in Part I, section five, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of the injury."

But it was also provided by Part V, sec. 3:

> "Section 3. Any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by this act, and a policy holder of such liability company shall be re-

garded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to all the regulations and obligations imposed upon the association."

Sections 66 and 67 of General Laws, c. 152, appeared as sections 1, 2, and 3, respectively, of Part I of chapter 751 of the 1911 Act as follows:

"Section 1. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury.

"Section 2. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers.

"Section 3. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by employees of a subscriber."

The provisions of section 68 of chapter 152, excluding from the benefits of the State Employers' Liability Act employees of insured persons who claim their rights of action at common law, appear as section 4.

"Section 4. The provisions of sections one hundred and twenty-seven to one hundred and thirty-five, inclusive, and of one hundred and forty-one to one hundred and forty-three, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, and of any acts in amendment thereof, shall not

apply to employees of a subscriber while this act is in effect."

Section 24 of chapter 152, relative to waiver by an employee of an insured person of his common-law rights, appears as section 5:

"Section 5. An employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after it is delivered to the employer or his agent."

The provisions of sections 66 and 67 of the Act taking away the common-law defenses referred to from employers who do not insure, and the provisions of section 68, taking away from the employees of an insured person who claim their common-law rights the benefits of the State Employers' Liability Act, which to a certain extent modified the common-law defenses, were first enacted as the above-quoted sections 1, 2, 3, and 4 of the 1911 Act.

Previous to that enactment the rights of employees against employers depended upon the common law and the provisions of the State Employers' Liability Act, which afforded the employee greater rights in certain defined instances.

See Massachusetts Acts 1909, c. 514, secs. 127-135, inclusive, and secs. 141-143, inclusive, now Mass. General Laws, c. 153 (Appendix, p. 86) and c. 229, sec. 4 (Appendix, p. 89).

Sections 66, 67, and 68, inclusive (Appendix, pp. 85-86), clearly assume, as a reason for their enactment and presence, the operation and effectiveness of the insurance features of the Act.

It is apparent, therefore, that the insurance features of the Act are essential and vital parts of the plan of the statute; that the other portions of the statute would not have been passed without them, and that sections 66, 67, and 68 were enacted as part of the plan of the Act and for the purpose of giving effect to its scheme.

The insurance features of the Act, therefore, being invalid in their application to the defendant, section 66 is likewise invalid and of no effect.

Williams v. *Standard Oil Co.*, 278 U.S. 235.
Lemke v. *Farmers' Grain Co.*, 258 U.S. 50.
Pollock v. *Farmers' Loan & Trust Co.*, 158 U.S. 601.
Howard v. *Illinois Central R.R. Co.*, 207 U.S. 463.

In *Williams* v. *Standard Oil Co.*, 278 U.S. 235, *supra*, a statute of Tennessee contained provisions for the fixing of prices at which gasoline might be sold. It contained other provisions, such as the requiring of furnishing of information concerning manufacture, cost and other details, with requirement of a permit fee, etc.

The statute contained a provision that if any section or provision of the Act should be held invalid, this should not affect the validity of other sections or provisions. The Court held that the price-fixing provisions of the law were void, and in holding that the other provisions must fall with these, say, at page 241:

> ". . . the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it and that the legislature intended the provision to

stand, in case others included in the act and held bad should fall.' "

. . . . . .

"In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. This is well stated in *Riccio* v. *Hoboken,* 69 N.J. L. 649, 662, where the New Jersey Court of Errors and Appeals, in an opinion delivered by Judge Pitney (afterward a Justice of this Court), after setting forth the rule as above, said:

" 'In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.' "

In *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U.S. 601, *supra,* it was held that the Act of Congress imposing taxes on the income of real estate and personal property was unconstitutional as being a direct tax; that the provisions of the Act imposing taxes upon the income of professions, employments, and vocations, although not objectionable in and of itself, being a part of the general scheme of the Act, were likewise void. The Court say, at page 636:

"Or, as the point is put by Mr. Justice Matthews in *Poindexter* v. *Greenhow,* 114 U.S. 270, 304 [29: 185, 197]: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that

the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact.' ''

In *Howard* v. *Illinois Central R.R. Co.*, 207 U.S. 463, *supra,* in holding that the Federal Employers' Liability Act of June 11, 1906, which included within its terms employees not engaged in interstate commerce, being unconstitutional as to such employees, was invalid in its entirety, the Court say, at page 501:

> ''Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy.''

Furthermore, the Act contains no clause expressing a legislative intent that, in event of invalidity of parts, other parts shall remain unaffected, thus adding to the presumption that the Act must stand or fall as a whole.

Furthermore, the effect of sections 66 and 67 is to make the defendant's exemption from the withdrawal of the common-law defenses conditional upon compliance with the unconstitutional insurance aspects of the Act.

A State cannot impose compliance with an unconstitutional law or the relinquishment of a constitutional right as a condition of the granting of a right or exemption from a burden, although the right or burden be of such nature as the State might withhold or impose unconditionally.

Western Union Tel. Co. v. *Kansas,* 216 U.S. 1.

Pullman Co. v. *Kansas*, 216 U.S. 56.
Frost Trucking Co. v. *Railroad Commission*, 271 U.S. 583.

In *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, *supra*, it was held that the state could not require the Telegraph Company, which was engaged in interstate business, as a condition of its right to do domestic business in the State, to pay a fee based upon the amount of its capital stock representing its property throughout the United States and foreign countries, and that the State could not oust the company from its purely domestic business therein for non-compliance with the condition.

In *Pullman Co.* v. *Kansas*, 216 U.S. 56, *supra*, in which the same question was presented under the same statute, the Court stated its decision in part as follows, at page 63:

> "That a decree ousting and prohibiting the company from doing intrastate business in Kansas was improperly granted, the aid of the court should have been refused and the bill dismissed, because a decree such as the State asked would, in effect, have recognized the validity of a condition which the State could not constitutionally prescribe under the guise of a fee for permission to do intrastate business."

In *Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, *supra*, it was held, as stated in the headnote:

> "Assuming that the use of its highways by private carriers for hire is a privilege which the State may deny, it can not constitutionally affix to that privilege the unconstitutional condition precedent that the carrier shall assume against his will the burdens and duties of a common carrier."

Therefore the statement of the State Court (Mass. Adv. Sheets, 1931, p. 1759; r. p. 39) that—

> "Whether the defendant shall avail itself of that act is wholly optional with it. If it does not insure in accordance with its provisions, it cannot, in common with all other employers in like situation, interpose the defences of assumption of risk, contributing negligence, or the fellow servant doctrine in actions for personal injury brought against it by its employees engaged in intrastate commerce"—

and the reasons given therefor, that the Legislature may change the common-law defenses as it sees fit, have no bearing upon the present case in view of the relation of section 66 to the Act as a whole and the invalidity of the conditions imposed in connection with its operation.

The Court stated, at the conclusion of its opinion:

> "The essential points of the case at bar, so far as they relate to interstate commerce, seem to us to be concluded against the contention of the defendant by the decisions in *New York Central Railroad* v. *White*, 243 U.S. 188, and *Hawkins* v. *Bleakly*, id. 210" (Mass. Adv. Sheets, 1931, p. 1761; r. p. 41).

But the questions herein presented were not raised in the cases referred to.

In *Hawkins* v. *Bleakly* it was held not to be violative of due process for a State to withdraw the common-law defenses from employers who voluntarily reject the compensation system there involved.

No question of the validity of that system under the Commerce Clause was involved, and no question was involved of the effect of invalid conditions in connection with the withdrawal of the common-law defenses.

In *New York Central Railroad Co.* v. *White*, the validity of an award under the New York Compensation Law was involved. The questions involved are stated, at

page 191, to be whether the liability of the company, in view of the employee's employment at the time of injury, was defined and limited by the provisions of the Federal Employers' Liability Act, and whether the award was in violation of the due process and equal protection clauses of the Fourteenth Amendment.

As to the first point, it was held that the employee was not engaged in interstate commerce, and that therefore the Federal Act had no application. No question was presented or considered as to the constitutionality under the Commerce Clause of an Act construed as the one here under consideration and the conditions imposed thereby in connection with the withdrawal of common-law defenses.

Assuming, therefore, that the State had a right to withdraw the common-law defenses in cases of purely intrastate injury, it could not make exemption from withdrawal conditional upon compliance with the unconstitutional and invalid insurance requirements of the Act.

Section 66 of the Act, therefore, being invalid, it follows that the defense of negligence of a fellow servant was open to the defendant at the trial, and, upon the finding and ruling of the trial Court that the plaintiff's injuries were caused by the negligence of a fellow servant (r. p. 26), the defendant was entitled to judgment in its favor.

The judgment of the Municipal Court of the City of Boston in favor of the respondent herein, the plaintiff below, should therefore be reversed, and judgment entered in favor of the petitioner, the defendant below.

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(Insertion ~~before first paragraph~~, page 62, as indicated)

The act there under consideration contained the following provisions:

Consolidated Laws of New York, chapter 67, as amended by chapter 41 of the Laws of 1914:

"§ 114. The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

17. Decision of department, etc., not suspended by appeal.
18. Independent contractor, etc.
19. Notice of injuries to be given to department.
20. Hospital records admissible as evidence.
21. Notice to employees.
22. Same subject.
23. Acceptance of payment, etc., by employee releases employer from liability, etc.
24. Notice by employee to retain rights at common law.
25. Payment of judgment by insured.

APPENDIX.

State Laws.

Workmen's Compensation

General Laws, Chapter 152

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3. Duties of division of industrial training.
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PROCEDURE.

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17. Decision of department, etc., not suspended by appeal.
18. Independent contractor, etc.
19. Notice of injuries to be given to department.
20. Hospital records admissible as evidence.
21. Notice to employees.
22. Same subject.
23. Acceptance of payment, etc., by employee releases employer from liability, etc.
24. Notice by employee to retain rights at common law.
25. Payment of judgment by insured.

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72. Waiver of rights by employee.
73. Election between compensation and pension.
74. Application of sections 69 to 75.
75. Agents for enforcing sections 69 to 74.

SECTION 1. The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

(1) "Average weekly wages", the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, re-

gard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

(2) "Department", the department of industrial accidents.

(3) "Dependents", members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury.

(4) "Employee", every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.

(5) "Employer" includes the legal representative of a deceased employer.

(6) "Insured" or "insured person", an employer who has provided by insurance for the payment to his employees of the compensation required by this chapter.

(7) "Insurer", any insurance company which has insured the compensation payable by an employer under this chapter.

(8) "Reviewing board", the reviewing board designated under section three of chapter twenty-four.

SECTION 2. The department shall make all necessary inspections and investigations relating to causes of injuries for which compensation may be claimed, and for this purpose any member or employee thereof may at any time enter

places of employment when being used for business purposes. It shall also have the powers and duties set forth in this chapter.

SECTION 3. The division of industrial training shall aid persons whose earning capacity has been impaired by industrial accident while residents of the commonwealth in obtaining such education, training and employment as will tend to restore their earning capacity. It may co-operate with the United States government and in co-operation with the department of education may establish and maintain, or assist in so doing in schools or institutions supported wholly or in part by the commonwealth, such courses as it may deem expedient, and otherwise may act in such manner as it may deem necessary to accomplish the purpose of this section. (Repealed St. 1921, c. 462, § 8, and duties transferred to State Board for Vocational Training.)

SECTION 4. The department shall make an annual report.

PROCEDURE.

SECTION 5. The department may make rules consistent with this chapter for carrying out its provisions. Process and procedure shall be as simple and summary as reasonably may be. The department or any member thereof may subpoena witnesses, administer oaths, and examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Upon the written request of the department or of any member thereof, together with interrogatories and cross-interrogatories, if any there be, filed with the clerk of the superior court for any county, commissions to take depositions of persons or witnesses residing without the commonwealth, or in foreign countries, or letters rogatory to a court in another state or to a court in a foreign country, shall forthwith issue from the said superior court, as in cases pending therein; and upon the return of the said depositions or answers to letters rogatory the same shall be opened by the clerk of the

court issuing the commissions or letters, and the said clerk shall endorse thereon the date when a deposition or answer to letters rogatory was received, and the same shall forthwith be delivered to the department. No entry fee shall be charged in such cases. The fee for attending as a witness before the department shall be one dollar and fifty cents a day; for attending before a member of the department, fifty cents a day; in both cases, five cents a mile for travel out and home. The superior court may enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records.

SECTION 6. If the insurer and the injured employee reach an agreement in regard to compensation, a memorandum thereof shall be filed with the department, and, if approved by it, the memorandum shall for all purposes be enforceable under section eleven. Such agreements shall be approved by said department only when the terms conform to this chapter.

SECTION 7. If the insurer and the injured employee fail to reach an agreement in regard to compensation, or if they have reached such an agreement, which has been signed and filed in accordance with this chapter, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payments under such agreement, either party may notify the department, which shall thereupon assign the case for hearing by a member thereof.

SECTION 8. Such member shall make such inquiries and investigations as shall be deemed necessary. The hearing shall be held in the town where the accident occurred or in such other place as the department may designate, and the decision of the member, together with a statement of the evidence, his findings of fact, rulings of law, and other matters pertinent to questions arising before him, shall be filed with the department. Unless a claim for review is

filed by either party within seven days, the decision shall be enforceable under section eleven.

SECTION 9. The department or any member thereof may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be five dollars and traveling expenses, but the department may allow additional reasonable amounts in extraordinary cases, and the insurer shall reimburse the department for the amount so paid. The report of the physician shall be admissible as evidence in any proceeding before the department or a member thereof; provided, that the employee and the insurer have seasonably been furnished with copies thereof.

(a) Whenever a medical question is in dispute in any case, and an impartial physician has not, prior to seven days before the date assigned for hearing thereon, been appointed by the department or a member thereof, the employee may engage his own physician to appear and testify in his behalf and, if the decision of the single member or the department is in favor of the employee, a reasonable fee shall be allowed by the member or by the department for such physician's services and shall be added to the amount awarded to the employee and be paid by the insurer under the provisions of this chapter.

SECTION 10. If a claim for a review is filed under section eight, the reviewing board shall hear the parties, and may hear evidence in regard to pertinent matters and may revise the decision in whole or in part, or may refer the matter back to the member for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties.

SECTION 11. Any party in interest may present certified copies of an order or decision of the reviewing board, a decision of a member from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the department, and all

papers in connection therewith, to the superior court for the county in which the injury occurred or for the county of Suffolk, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact or where the decree is based upon a decision of a member or a memorandum of agreement, and except that there shall be no appeal from a decree based upon an order or decision of the reviewing board which has not been presented to the court within ten days after the notice of the filing thereof by said board. Upon the presentation to it of a certified copy of a decision ending, diminishing or increasing a weekly payment under the following section the court shall revoke or modify the decree to conform to such decision.

SECTION 12. Questions as to a weekly payment may be heard and decided by the reviewing board, or any member of the department, and the reviewing board or such member may, in accordance with the evidence and subject to this chapter, issue any order deemed advisable. If the case is heard and decided by a member, his decision may be reviewed under sections eight and ten.

When in any case before the board there appears of record a finding that the employee is entitled to compensation, no subsequent finding by the board or by a member thereof discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res judicata as a matter of law, and such employee or his dependents, in the event of his death, may have further hearings as to whether his incapacity or death is or was the result of the injuries for which he received compensation; provided, that if the board shall determine that the petition for such a rehearing is without

merit and frivolous, the employee or his dependents shall not thereafter be entitled to file any subsequent petition therefor except for cause shown and in the discretion of the member to whom such subsequent petition may be referred, and that, in the event of the death of the employee, such a petition for a rehearing shall be filed within three months from the time of his decease and within one year from the date of the finding terminating his compensation.

SECTION 13. Fees of attorneys and physicians and charges of hospitals for services under this chapter shall be subject to the approval of the department. If the insurer and any physician or hospital, or the employee and any attorney, fail to agree as to the amount to be paid for such services, either party may notify the department, which may thereupon assign the case for hearing by a member thereof. The members shall report the facts to the department for decision, and decision shall be enforceable under section eleven.

SECTION 14. If the reviewing board, any member of the department or any court before which proceedings under this chapter are brought determines that such proceedings have been brought, prosecuted or defended without reasonable ground, the whole cost of the proceedings shall be assessed upon the party who has so brought, prosecuted or defended them.

SECTION 15. Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insurer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but not against both. If compensation be paid under this chapter, the insurer may enforce, in the name of the employee or in its own name and for its own benefit, the liability of such other person; and in case the insurer recovers a sum greater than that paid by it to the employee, four fifths of the excess shall be paid to the employee; but

the insurer shall not make any settlement by agreement with such other person without the approval of the industrial accident board. An employee shall not be held to have exercised his option under this section to proceed at law if, at any time prior to trial of an action at law brought by him against such other person, he shall, after notice to the insurer, discontinue such action, provided that upon payment of compensation following such discontinuance the insurer shall not have lost its right to enforce the liability of such other person as hereinbefore provided.

SECTION 16. Questions arising under this chapter, if not settled by agreement by the parties interested therein, shall, except as otherwise provided in this chapter, be determined by the department. The decisions of the department shall for all purposes be enforceable under section eleven.

SECTION 17. Orders or decisions of the reviewing board or department, decrees of the superior court upon such orders, decisions of a member of the department from which no claim for review has been filed within the time allowed therefor, or memoranda of agreements approved by the department shall have effect, notwithstanding an appeal, until it is otherwise ordered by a justice of the supreme judicial court, who may in any county suspend or modify such decree, order or decision, during the pendency of the appeal.

SECTION 18. If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons. The insurer, how-

ever, shall be entitled to recover indemnity from any other person who would have been liable to such employees independently of this section; and if the insurer has paid compensation under this section, it may enforce, in the name of the employee or in its own name and for its benefit, the liability of such other person. This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the insured, nor to any case where the injury occurred elsewhere than on, in or about the premises on which the contractor has undertaken to execute the work for the insured or which are under the control or management of the insured.

SECTION 19. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an injury, a written report thereof shall be made to the department on blanks to be procured from it. Upon the termination of the disability of the injured employee, the employer shall make a supplemental report upon blanks to be procured from it. If the disability extends beyond a period of sixty days, the employer shall report to the department at the end of such period that the injured employee is still disabled, and upon the termination of the disability shall file a final supplemental report as provided above.

The said reports shall contain the name and nature of the business of the employer, the situation of the establishment, the name, age, sex and occupation of the injured employee, and shall state the date and hour of any accident causing the injury, the nature and cause of the injury, and other information required by the department.

Employers refusing or neglecting to make the report required by this section shall be punished by a fine of not more than fifty dollars.

Copies of reports of injuries filed by employers with the department and statistics and data compiled therefrom shall be kept available by it, and shall be furnished on request to the department of labor and industries for its own use.

Within sixty days after the termination of the disability of the injured employee, the insurer shall file with the department a statement showing the total payments made or to be made for compensation and for medical services for such injured employee.

SECTION 20. Copies of hospital records kept in accordance with section seventy of chapter one hundred and eleven, certified by the persons in custody thereof to be true and complete, shall be admissible in evidence in proceedings before the department or any member thereof. The department or any member, before admitting any such copy in evidence may require the party offering the same to produce the original record. All medical records and reports of hospitals, clinics and physicians of the insurer or of the employee shall be open to the inspection of the department so far as relevant to any matter before it.

SECTION 21. Every insured person shall, as soon as he secures a policy, give written or printed notice to all persons under contract of hire with him that he has provided for payment to injured employees by the insurer.

SECTION 22. Every insured person shall give written or printed notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the insurer. An employer ceasing to be insured shall, on or before the day on which his policy expires, give written or printed notice thereof to all persons under contract with him. In case of the renewal of the policy no notice shall be required. He shall file a copy of said notice with the department. The notices required by this and the preceding section may be given in the manner therein provided or in such other manner as may be approved by the department.

SECTION 23. If an employee of an insured person files any claim with or accepts payment from the insurer on account of personal injury, or makes any agreement, or submits to a hearing before a member of the department under section eight, such action shall constitute a release to the insured of all claims or demands at law, if any, arising from the injury.

SECTION 24. An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. An employee who has given notice to his employer that he claimed his right of action as aforesaid may waive such claim by a written notice, which shall take effect five days after it is delivered to the employer or his agent. The notices required by this section shall be given in such manner as the department may approve. An employee under a contract of hire with an insured person, made prior to the effective date of so much of this act as is not affected by section fourteen, shall be deemed to have waived his rights of action to recover damages for personal injuries under the law of any other jurisdiction in respect to injuries therein occurring if he shall not give his employer, within thirty days after said effective date, written notice that he claims such rights.

SECTION 25. If an insured person who has complied with the rules, regulations and demands of the insurer is required by a judgment of court to pay to an employee any damages on account of personal injury sustained by such employee during the period covered by insurance, the insurer shall pay to the insured the full amount of such judg-

ment and the cost assessed therewith if the insured shall have given the insurer written notice of the bringing of the action in which the judgment was recovered and an opportunity to appear and defend the same.

PAYMENTS.

SECTION 26. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury; provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it.

SECTION 27. If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation.

SECTION 28. If the employee is injured by reason of the serious and wilful misconduct of an insured person or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the insured shall repay to the insurer the extra compensation paid to the employee. If a claim is made under this section the insured may appear and defend against such claim only.

SECTION 29. No compensation shall be paid for any injury which does not incapacitate the employee for a period of at least seven days from earning full wages, but if in-

capacity extends beyond such period, compensation shall begin on the eighth day after the injury, and if incapacity extends beyond a period of four weeks, compensation shall be paid from the day of injury, but except under section thirty-five no compensation shall be paid for any period for which any wages were earned. When compensation shall have begun it shall not be discontinued except with the written assent of the employee or the approval of the department or a member thereof; provided, that such compensation shall be paid in accordance with section thirty-five if the employee in fact earns wages after the original agreement is filed.

SECTION 30. During the first two weeks after the injury, and, if the employee is not immediately incapacitated thereby from earning full wages, then, from the time of such incapacity, and in unusual cases, or cases requiring specialized or surgical treatment, in the discretion of the department, for a longer period, the insurer shall furnish adequate and reasonable medical and hospital services, and medicines if needed, together with the expenses necessarily incidental to such services. The employee may select a physician other than the one provided by the insurer, and in case he shall be treated by a physician of his own selection, or where, in case of emergency or for other justifiable cause, a physician other than the one provided by the insurer is called in to treat the injured employee, the reasonable cost of his services shall be paid by the insurer, subject to the approval of the department. Such approval shall be granted only if the department finds that the employee was so treated by such physician or that there was such emergency of justifiable cause, and in all cases that the services were adequate and reasonable and the charges reasonable.

SECTION 31. If death results from the injury, the insurer shall pay the following dependents of the employee wholly dependent upon his earnings for support at the time of his injury, compensation as follows:—to the widow, so long

as she remains unmarried, ten dollars a week if and so long as there is no child of the employee, who is under the age of eighteen, or over said age and physically or mentally incapacitated from earning; twelve dollars a week if and so long as there is one such child, and two dollars more a week for each such additional child; and if the widow dies, such amount as would have been payable had she lived shall be paid to the surviving children aforesaid in equal shares; but if such widow remarries, the aforesaid payments to her shall terminate and the insurer shall pay each week to each of such children, if and so long as there are more than five, his or her proportionate part of sixteen dollars, and shall pay to each of such children, if and so long as there are five or less, three dollars a week. The total amount of such payments shall not be more than sixty-four hundred dollars and said payments shall not continue more than four hundred weeks. When weekly payments have been made to an injured employee before his death, the compensation under the foregoing provisions of this section shall begin from the date of the last of such payments but shall not amount to a total of more than sixty-four hundred dollars, including such payments as were made to the injured employee before his death, and shall not continue for more than four hundred weeks from the date of the injury.

In all other cases of total dependency, the insurer shall pay the dependents of the employee wholly dependent upon his earnings for support at the time of injury a weekly payment equal to two-thirds of his average weekly wages, but not more than ten dollars nor less than four dollars a week for a period of five hundred weeks from the date of the injury; but in no case shall the amount be more than four thousand dollars. If the employee leaves dependents only partially dependent upon his earnings for support at the time of his injury, the insurer shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent

as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death, the compensation under this paragraph to dependents shall begin from the date of the last of such payments, but shall not continue for more than five hundred weeks from the date of the injury.

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SECTION 34. While the incapacity for work resulting from the injury is total, the insurer shall pay the injured employee a weekly compensation equal to two-thirds of his average weekly wages, but not more than eighteen dollars nor less than nine dollars a week, except that the weekly compensation of the injured employee shall be equal to his average weekly wages in case such wages are less than nine dollars; and the period covered by such compensation shall not be greater than five hundred weeks nor the amount more than forty-five hundred dollars.

SECTION 35. While the capacity for work resulting from the injury is partial, the insurer shall pay the injured employee a weekly compensation equal to two-thirds of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter but not more than eighteen dollars a week; and the amount of such compensation shall not be more than forty-five hundred dollars.

SECTION 36. In case of the following specified injuries the amounts hereinafter named shall be paid in addition to all other compensation: . . .

[It is not thought necessary to print the details of the additional compensation.]

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SECTION 39. The compensation payable in case of the death of the injured employee shall be paid to his legal representative; or, if he has no legal representative, to his dependents; or, if he leaves no dependents, to the persons

to whom payment of the expenses for the last sickness and burial is due. If payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this chapter. When the appointment of a legal representative of a deceased employee, not otherwise necessary, is required to comply with this chapter, the insurer shall furnish or pay for legal services rendered in connection with the appointment of such representative, or in connection with his duties, and shall pay the necessary disbursements for such appointment, the necessary expenses of such representatives and reasonable compensation to him for time necessarily spent in complying therewith. Said payments shall be in addition to sums paid for compensations.

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SECTION 41. No proceedings for compensation for an injury shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury has been made within six months after its occurrence, or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such incapacity, or, in case an action against a third person is discontinued as provided in section fifteen, within thirty days after such discontinuance.

SECTION 42. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured, or, in case of his death, by his legal representative, or by a person to whom payments may be due under this chapter, or by a person in behalf of any one of them. Any form of written communication signed by a person who may give the notice as above provided, containing the information that the person has been so injured, giving the time, place, and cause of the injury, shall be considered a sufficient notice.

SECTION 43. The notice shall be served upon the insurer or an officer or agent thereof, or upon the insured, or upon one insured person if there is more than one, or upon any officer or agent of a corporation if the insured is a corporation, by delivering it to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person on whom it is to be served, at his last known residence or place of business.

SECTION 44. Such notice shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice.

SECTION 45. After an employee has received an injury, and from time to time thereafter during the continuance of his disability he shall, if requested by the insurer or insured, submit to an examination by a registered physician, furnished and paid for by the insurer or the insured. The employee may have a physician provided and paid for by himself present at the examination. If a physician provided by the employee is not present at the examination, it shall be the duty of the insurer to file with the department a copy of the report of its examining physician or physicians if and when such report is to be used as the basis of any order by the department. If the employee refuses to submit to the examination or in any way obstructs it, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

SECTION 46. No agreement by any employee to waive his rights to compensation shall be valid, but an employee who is for any reason peculiarly susceptible to injury or who is peculiarly likely to become permanently or totally incapacitated by an injury may, at the discretion of the department,

and with its written approval within one month of the beginning of his employment, waive his rights to compensation under sections thirty-four, thirty-five and thirty-six, or any of them.

SECTION 47. No payment shall be assignable or subject to attachment, or be liable in any way for debts.

SECTION 48. Whenever the department deems it to be for the best interests of the employee or his dependents, and the parties agree, the liability for compensation may be redeemed by the payment in whole or in part by the insurer of a lump sum of an amount to be fixed by the department, not exceeding the amount provided by this chapter. The department, in the case of a minor who has received permanently disabling injuries, either partial or total, may at any time provide that he be compensated in whole or in part by the payment of a lump sum, of an amount to be fixed by the department, not exceeding the amount provided by this chapter.

SECTION 49. The claim for compensation shall be in writing, and shall state the time, place, cause and nature of the injury. It shall be signed by the person injured, or, in the event of his death, by his legal representative, or by a person to whom payments may be due, or by a person in behalf of any of them, and shall be filed with the department. A claim for compensation shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, cause or nature of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Failure to make a claim within the time fixed by section forty-one shall not bar proceedings under this chapter if it is found that it was occasioned by mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay. In no case shall failure to make a claim bar proceedings if the insurer has executed an agreement in regard to compensation with the employee or made any payment for compensation under this chapter.

SECTION 50. Whenever any question involving the compensation of an injured employee or his dependents is appealed to the supreme judicial court, and the decision is in favor of the employee or his dependents, interest to the date of payment shall be paid by the insurer on all sums due as compensation to such employee or dependents.

SECTION 51. Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, his wages would be expected to increase, that fact may be considered in determining his weekly wages.

INSURANCE COMPANIES

SECTION 52. Any insurance company authorized to transact business in this commonwealth under sub-division (b) or (e) of the sixth clause of section forty-seven of chapter one hundred and seventy-five may, except as provided in clause (c) of section fifty-four of said chapter, insure the payment of the compensation provided for by this chapter, and when any such company insures the payment of such compensation it shall file with the commissioner of insurance its classifications of risks and premiums relating thereto and subsequent proposed classifications or premiums, which shall not take effect until approved by the commissioner of insurance as adequate and reasonable for the risks to which they respectively apply; provided, that upon petition of the company or any other party aggrieved the opinion of the commissioner shall be subject to review by the supreme judicial court. The commissioner may withdraw his approval.

SECTION 53. Any mutual liability insurance company authorized to do business in this commonwealth may with the approval of the commissioner of insurance distribute its risks into groups in accordance with the nature of the business and the degree of the liability of injury and with

like approval fix by and for such groups in accordance with the experience of each group all premiums, assessments and dividends; but all the funds of the company both actual and contingent shall be available for the payment of any claim against the company.

SECTION 54. Policies of workmen's compensation insurance issued or delivered in the commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by this chapter, whatever other contingencies may be insured by riders attached thereto or endorsements thereon. On the face of such policies shall be printed conspicuously the words: "Insurance under this policy is in Class of the company's Workmen's Compensation Classification Manual", and in the blank thus provided the number or other designation in said manual under which the said policy is written shall be placed before the policy is issued.

SECTION 55. No such policy of insurance shall be issued or delivered until a copy thereof has been filed with the commissioner of insurance at least thirty days prior to such issue or delivery, unless before the expiration of the thirty days the said commissioner shall have approved the form of the policy in writing, nor if the commissioner notifies the company in writing that in his opinion the form of said policy does not comply with the laws of the commonwealth, specifying the reasons for his opinion; provided, that upon petition of the company the opinion of the commissioner shall be subject to review by the supreme judicial court.

Any policy of insurance issued in violation of this section or of section fifty-six or sixty shall be valid and binding upon the company issuing it, and the rights, duties and obligations of the parties thereto shall be determined by this chapter and chapter one hundred and seventy-five.

SECTION 56. Two or more insurance companies authorized to issue such insurance policies in the commonwealth may unite in issuing joint and several workmen's compen-

sation policies which may be headed by the names of all such companies. Such policies shall be subject to approval by the commissioner of insurance.

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SECTION 63. Insurance companies insuring employees under this chapter shall, at the request of the department, furnish it in writing any information required in connection with the administration by said department of this chapter, including any statistics and the names of all employers insured by them.

SECTION 64. The insurer shall make and enforce reasonable rules and regulations for the prevention of injuries on the premises of insured persons, and for this purpose inspectors of the insurer shall have free access to all such premises during regular working hours. Insured persons or employees thereof aggrieved by such rules or regulations may petition the department of labor and industries for a review, and it may affirm, amend or annul the rule or regulation.

SECTION 65. For every case of personal injury resulting in death covered by this chapter, when there are no dependents, the insurance company shall pay into the treasury of the commonwealth one hundred dollars. Such payments shall constitute a special fund in the custody of the state treasurer who shall make payments therefrom upon the written order of the department for the purposes set forth in section thirty-seven.

MISCELLANEOUS PROVISIONS.

SECTION 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury.

SECTION 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person.

SECTION 68. Chapter one hundred and fifty-three and sections four and seven to ten, inclusive, of chapter two hundred and twenty-nine shall not apply to employees of an insured person, nor to laborers, workmen or mechanics employed by any county, city, town or district subject to sections sixty-nine to seventy-five, inclusive, while this chapter is in effect.

. . . . . .

Sections 69 to 75, inclusive, deal with compensation to employees of the Commonwealth and of cities and towns.

These sections and sections 32, 33, part of section 36, sections 37, 38, 40, and 57 to 62, inclusive, which can have no bearing upon the questions involved, have been omitted.

MASSACHUSETTS GENERAL LAWS, C. 153.

LIABILITY OF EMPLOYERS TO EMPLOYEES FOR INJURIES NOT RESULTING IN DEATH.

Section 1. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care by reason of—

First, a defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or

Second, The negligence of a person in the service of the employer who was intrusted with and was exercising super-

intendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or

Third, The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine, elevated train or train upon a railroad or elevated railway;

The employee, or his legal representatives, shall, subject to the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car in use by or in possession of a railroad corporation, or an elevated car in use by or in possession of an elevated railway corporation, shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession, within the meaning of clause first, whether owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause third, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine, elevated train or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine, elevated train or train within the meaning of said clause.

This section shall not apply to injuries caused to domestic servants or farm laborers by fellow employees.

. . . . . .

Section 5. The amount of damages awarded in an action under section one for a personal injury to an employee, in which no damages for his death are awarded, shall not exceed four thousand dollars.

Section 6. No action for the recovery of damages for injury under section one of this chapter or for death under

section four or seven of chapter two hundred and twenty-nine shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf. If the person injured dies within the time required for giving the notice, his executor or administrator may give such notice within sixty days after his appointment; and in such case the action may be begun within one year after the appointment of such executor or administrator. If from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies within said ten days his executor or administrator may give such notice within sixty days after his appointment. If the employer dies without such notice having been given and before the time for giving such notice has elapsed, the notice may be given to his executor or administrator, and the time within which the notice may be given as herein provided shall run from the appointment of the executor or administrator. A notice given under this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. If the employer dies without such action having been brought and before the time for bringing the action has elapsed, the action may be begun against his executor or administrator not less than six months and not more than one year after the executor or administrator has given bond for the performance of his trust. Any form of written communication signed by the person so injured, or by some person in his behalf, or by his executor or administrator, or by some person in behalf of such executor or administrator, con-

taining the information that the person was so injured, giving the time, place and cause of the injury or death, shall be considered a sufficient notice.

MASSACHUSETTS GENERAL LAWS, c. 229.

ACTIONS FOR DEATH AND INJURIES RESULTING IN DEATH.

Section 4. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under section one of chapter one hundred and fifty-three, an employee is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.. This section shall not apply to injuries caused to domestic servants or farm laborers by fellow employees.

United States Laws.

CONSTITUTION OF UNITED STATES, ARTICLE I, SECTION 8.

The congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Act, Apr. 22, 1908, c. 149; 35 Stat. 65.

Section 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

. . . . . .

Section 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 4. In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Section 6. (as amended by Act Apr. 5, 1910, c. 143, sec. 1): No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Section 7. The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Section 8. Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

U.S. Code, Title 45, Chapter 1.

Safety Appliances and Equipment on Railroad Engines and Cars, and Protection of Employees and Travelers.

Section 1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. (Mar. 2, 1893, c. 196, §1, 27 Stat. 531.)

Section 2. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. (Mar. 2, 1893, c. 196, §2, 27 Stat. 531.)

Section 3. When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this chapter, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this chapter, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this chapter. (Mar. 2, 1893, c. 196, §3, 27 Stat. 531.)

Section 4. Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. (Mar. 2, 1893, c. 196, §4, 27 Stat. 531.)

Section 5. No freight cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the prescribed standard as to height of drawbars. (Mar. 2, 1893, c. 196, §5, 27 Stat. 531.)

Section 6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge; Provided, That nothing in this chapter contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (Mar. 2, 1893, c. 196, §6, 27 Stat. 532; Apr. 1, 1896, c. 87, 29 Stat. 85.)

Section 7. Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the

provision of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge. (Mar. 2, 1893, c. 196, §8, 27 Stat. 532.)

Section 8. The preceding provisions and requirements of this chapter shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this chapter, or which are used upon street railways. (Mar. 2, 1903, c. 976, §1, 32 Stat. 943.)

Section 9. Whenever, as provided in this chapter, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said chapter, the interstate commerce commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said interstate commerce commission shall be subject to the like penalty as failure to comply with any requirement of this section. (Mar. 2, 1903, c. 976, §2, 32 Stat. 943.)

. . . . . .

Section 11. It shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled, or used on its line any car subject to the provisions of this chapter not equipped with appliances herein provided for, to wit; all cars must be equipped with secure sill steps and efficient handbrakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: provided, That in the loading and hauling of long commodities, requiring more than one car, the handbrakes may be omitted on all save one of the cars while they are thus combined for such purpose. (Apr. 14, 1910, c. 160, §2, 36 Stat. 298.)

Section 12. The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this chapter as designated by the interstate commerce commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter, unless changed by an order of said interstate commerce commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the interstate commerce commission shall be subject to a like penalty as failure to comply with any requirement of this chapter. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. (Apr. 14, 1910, c. 160, §3, 36 Stat. 298.)

Section 13. Any common carrier subject to this chapter using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this chapter not equipped as provided in this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered as provided in section 6 of this chapter: Provided, That where any car shall have been properly equipped, as provided in this chapter, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this chapter, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this chapter; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or "perishable" freight. (Apr. 14, 1910, c. 160, §4, 36 Stat. 299.)

Section 14. Except that, within the limits specified in the preceding section of this chapter the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11, 12, and 13 of this chapter shall be held or construed to relieve any common carrier, the interstate commerce com-

mission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements heretofore set out in this chapter; and, except as aforesaid, all of such provisions, powers, duties, requirements, and liabilities shall apply. (Apr. 14, 1910, c. 160, §5, 36 Stat. 299.)

. . . . . .

Section 16. The provisions of sections 11, 12, 13, 14 and 15 as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in the first nine sections of this chapter. (Apr. 14, 1910, c. 160, §1, 36 Stat. 298.)

Section 17. It shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic or for any common carrier by railroad in any territory of the United States or the District of Columbia to use any locomotive, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive. (May 30, 1908, c. 225, §§ 1, 2, 35 Stat. 476.)

. . . . . .

Section 23. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (June 7, 1924, c. 355, §2, 43 Stat. 659.)

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CHARLES ELMOR

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

vs.

FRED ARMBURG.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLARENCE W. ROWLEY,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

vs.

FRED ARMBURG, RESPONDENT.

RESPONDENT'S BRIEF.

Statement of the Case.

This was an action of tort at common law to recover damages for personal injuries sustained on July 8, 1929, by the respondent Fred Armburg, plaintiff in the court below, a section hand in the employ of the petitioner in intrastate commerce on land, by reason of the negligence of the section foreman, a fellow servant.

At the trial the petitioner contended that the common law defence of negligence of a fellow servant,

abolished by Massachusetts Statute 1911, ch. 751, part 1, sect. 1, now General Laws, ch. 152, sect. 66, was open to it in this action and asked the Court to rule that said Section 66 violates the Commerce Clause of the Federal Constitution if it be construed as applicable to the petitioner, which is a railroad corporation engaged partly in intrastate and partly in interstate commerce.

The specific rulings requested, refused and now before this Court, are as follows:

(Request No. 11.) St. 1911, ch. 751, part 1, sect. 1, now General Laws, ch. 152, sect. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

(Request No. 14.) "Upon all the evidence the plaintiff is not entitled to recover in this action upon the following grounds and each of them:

(h) Because as a matter of law St. 1911, ch. 751, part 1, sect. 1, now General Laws, ch. 152, sect. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

The statute attacked is as follows:

G. L. Ch. 152, Sect. 66: "In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury."

After a finding in favor of the plaintiff Armburg, the case was taken to the Appellate Division of the Municipal Court, thence to the Supreme Judicial Court of Massachusetts, which courts held that the petitioner comes within the scope of the Workmen's Compensation Act in its interstate commerce only; that the Act is constitutional and does not violate the Commerce Clause of the Federal Constitution; that the petitioner, not having become a subscriber under the Workmen's Compensation Act, cannot avail itself of the fellow servant defence abolished by Sect. 66 of Ch. 152, Massachusetts General Laws, and that it is liable at common law for injuries sustained by an employee while employed in intrastate commerce, caused by the negligence of a fellow servant.

The only question presented is whether Sect. 66 abolishing the fellow servant defence violates the Commerce Clause of the Federal Constitution.

Points and Authorities.

The cause of action arose from an injury sustained by the respondent Armburg while he was employed in intrastate commerce on land. Armburg was not engaged in interstate commerce. His work had nothing to do with that part of the petitioner's business which was interstate.

"The completely internal commerce of a state, then, may be considered as reserved for the state itself."

Gibbons v. *Ogden*, 9 Wheat, 1, 195.

The jurisprudence of the state, of personal injuries received by railroad employees while engaged in intrastate commerce, is supreme and exclusive.

Wabash Railroad v. *Hayes*, 234 U. S. 86, 89, 90.
Illinois Central Railroad v. *Behrens*, 233 U. S. 374.
Taylor v. *Taylor*, 232 U. S., 363, 368.
Michigan Central Railroad v. *Vreeland*, 227 U. S. 66, 67.
Toledo, St. Louis & Western Railroad v. *Slavin*, 236 U. S. 454.
Raymond v. *Chicago, Milwaukee & St. Paul Railway*, 243 U. S. 43, 45.

The rules of law relating to the effect of negligence by a fellow servant were established by the Courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defences.

Missouri Pacific Railway v. *Mackey*, 127 U. S. 205.
Minnesota Iron Co. v. *Kline*, 199 U. S. 593.
New York Central Railroad v. *White*, 243 U. S. 188, 200.
Silver v. *Silver*, 280 U. S. 117, 122.

The Workmen's Compensation Act is an exercise of the police power of the Commonwealth.

Mountain Timber Co. v. *Washington*, 243 U. S. 219, 238, 239.

Madera Sugar Pine Co. v. *Industrial Accident Commission*, 262 U. S. 488, 501, 502.

This Court repeatedly has upheld the authority of the states to establish by legislation, departures from the fellow servant rule and other common law rules affecting the employers' liability for personal injuries to the employee.

New York Central Railroad Co. v. *White*, 243 U. S. 188.

No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.

The common law bases the employers' liability for injuries to the employee on the ground of negligence.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation assumed by the employee and presumably taken into account in the fixing of his wages.

The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions, respecting who should be deemed a fel-

low servant and who a vice principal or *alter ego* of the master, turning sometimes upon refined distinctions as to class and departments in the employment. It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

New York Central Railroad Co. v. *White,* 243 U. S. 188.

Laws regulating the responsibility of employers for the injury or death of employees arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned, that they properly may be regarded as coming within the category of police regulation.

Sherlock v. *Alling,* 93 U. S. 99, 103.

It is clear that the employer has no vested right to have these so-called common law defences perpetuated for his benefit and that the Fourteenth Amendment does not prevent a state from establishing a system of workmen's compensation without the consent of the employer incidentally abolishing the defences referred to.

Hawkins v. *Bleakly,* 243 U. S. 210.

The New York Compensation Act, held constitutional in *New York Central Railroad* v. *White,* 243 U. S. 188, is compulsory. Employers are obliged to provide compensation for their employees who suffer injuries arising out of their employment.

The Iowa Compensation Act, held constitutional in *Hawkins* v. *Bleakly*, 243 U. S. 210, is, like the Massachusetts Act, optional. "If the employer rejects the Act he remains liable for personal injury sustained by an employee arising out of and in the usual course of the employment and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a co-employee."

Hawkins v. *Bleakly*, 243 U. S. 210.

The abolition of such defences is within the power of the state and the legislation cannot be condemned when that power has been qualifiedly exercised without unreasonable discrimination.

Hawkins v. *Bleakly*, 243 U. S. 210.

The essential points of the case at Bar, so far as they relate to interstate commerce, are concluded against the contention of the petitioner by the decisions in *New York Central Railroad* v. *White*, 243 U. S. 188, and *Hawkins* v. *Bleakly*, 243 U. S. 210.

The Massachusetts Workmen's Compensation Act is in no way applicable to the interstate commerce of the petitioner or its employees while engaged in that commerce.

Armburg v. *Boston and Maine Railroad*, Mass. 1931. Adv. Sheets, 1751.

The petitioner is not a subscriber under the Massachusetts Workmen's Compensation Act. It remains outside of the provisions of that Act by choice. It contends that it would be inconvenient for it to so keep its records and accounts as to separate its payroll in intrastate commerce from its interstate commerce and thus ascertain the payroll for insurance premiums under the Compensation Act, but the record discloses no evidence to sustain this contention.

"The separation of intrastate and interstate property, revenues and expenses of the company is important, not simply as a theoretical allocation to two branches of the business; it is essential to the appropriate recognition of the competent governmental authority in each field of regulation."

Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 148.

The Massachusetts Workmen's Compensation Act, Statute 1911, Ch. 751, now General Laws Ch. 229, was a humanitarian measure enacted in response to the conviction that previous remedies had failed to give the measure of relief to employees for personal injuries arising out of their employment demanded by modern conditions. The main purpose of the Act was to substitute a method of accident insurance in place of the rights and liabilities established by the common law as modified by the Employers' Liability Act and other Statutes for substantially all employees save the excepted classes, to the extent that the attainment of that result was within the jurisdiction of the General

Court. Although the Act was optional and not compulsory, its general tenor disclosed a legislative aim to secure its wide adoption and use.

The statute is as broad as the jurisdiction of the Commonwealth.

Armburg v. *Boston and Maine Railroad,* Mass. 1931. Adv. Sheets 1751.

The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce.

Nogueira v. *New York, New Haven & Hartford Railroad Co.,* 281 U. S. 128.

The State law is as supreme and exclusive in its application to intrastate commerce as is the Federal law to interstate commerce. If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the Federal law; if in the latter service, such liability rests wholly upon the State law.

St. Louis, Iron Mountain & Southern Railway v. *Hesterly,* 228 U. S. 702.

Taylor v. *Taylor,* 232 U. S. 363.

Seaboard Air Line Railway v. *Horton,* 233 U. S. 492, 501.

The record discloses no requirement that the amount of the railroad's payroll in intrastate commerce must be determined in advance. It appears that the Insurance Commissioner approves the rates of premiums charged for compensation insurance which must be paid upon the basis of the entire payroll which is the subject of insurance; that is, upon the wages actually paid for work in intrastate commerce only.

If the question of difficulty or inconvenience in determining the amount of the payroll in intrastate commerce upon which compensation insurance premiums must be paid in order that the petitioner may become a subscriber is open upon this record, then it is respectfully submitted that the amount of the payroll in intrastate commerce is not to be determined in advance but merely estimated and payment made subject to adjustment when exact figures appear.

If it is a matter of common knowledge that the amount cannot be determined in advance, then it is equally a matter of common knowledge that companies writing compensation insurance adjust the premiums after the books are audited at the close of the year so that the premiums actually paid are determined by the actual payroll as shown by the books.

So far as this record discloses, the petitioner remains outside the compensation system by choice; it has never attempted or desired to become a subscriber; it has never attempted to segregate its intrastate from its interstate commerce; it has had no difficult accounting problems; it keeps accounts showing its total payroll, its monthly payroll and compensation. Nothing

appears to show that its estimate of intrastate freight, ten or fifteen per cent of its total freight, cannot be verified from its books, or that its revenue, capital invested and expenses in its intrastate commerce cannot be easily segregated from that of its interstate commerce.

CLARENCE W. ROWLEY,
Attorney for Respondent.

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Supreme Court of the United States

October Term, 1931.

No. 477.

Boston and Maine Railroad,
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v.

Fred Armburg,
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RESPONDENT'S BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION FOR WRIT OF CERTIORARI.

CLARENCE W. ROWLEY,
Counsel for the Respondent.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
PETITIONER,
v.
FRED ARMBURG,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION FOR WRIT OF CERTIORARI.

None of the issues which the petitioner now seeks to introduce were raised in the Trial Court.

No question concerning the Federal Employers' Liability Act, the Safety Appliance Acts, or the Hours of Service Act was raised at the trial.

The only requests for rulings upon the constitutional question were No. 11 (Record, page 24) and No. 14, h. (Record, page 25), that St. 1911, Ch. 751, Part 1, *Sect. 1*, now G. L. Ch. 152, *Sect. 66*, violates the Commerce Clause. This section is the statute law of Massachusetts enacted in 1911 abolishing the fellow servant defence. None of the other

requests (Record, pages 23, 24, 25) raised any constitutional question. The petitioner contended in the Trial Court that the Massachusetts Workmen's Compensation Act does not apply to it, and that a railroad corporation engaged in both intrastate and interstate commerce falls altogether outside of the Workmen's Compensation Act, its claim being based not on constitutional grounds but upon the contention that the Massachusetts Legislature did not intend to include within the Act the local commerce of railroads over which the state certainly has jurisdiction. The only claim of unconstitutionality made at the trial relates to the single section of the Massachusetts statute which abolishes the fellow servant defence.

The attention of the court is respectfully directed to the material difference between the words in the petition for certiorari (page 5) "The petitioner also requested a ruling that if *said Act and Sect. 66 thereof* be construed as applying to the defendant, a railroad corporation engaged in both intrastate and interstate commerce, it was in violation of the Commerce Clause" and the request made before the Trial Court (Record, page 24) "Statute 1911, Ch. 751, Part 1, *Sect. 1* now G. L. Ch. 152, *Sect. 66* violates the Commerce Clause of the Federal Constitution if it be construed as applicable to the defendant * * *".

Respectfully submitted,

CLARENCE W. ROWLEY,
Counsel for Respondent.

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CHARLES ELMORE

Supreme Court of the United States

October Term, 1931.

No. 477,

Boston and Maine Railroad,
Petitioner,

vs.

Fred Armburg,
Respondent.

BRIEF FOR THE RESPONDENT.

CLARENCE W. ROWLEY,
Counsel for the Respondent.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
PETITIONER,
vs.
FRED ARMBURG,
RESPONDENT.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts was filed September 12, 1931, and is reported in Massachusetts Advance Sheets, 1931, p. 1751. It is printed at p. 33 of the record.

The opinion of the Appellate Division of the Municipal Court of the City of Boston was filed June 27, 1930. It is printed at p. 28 of the record.

Statement of the Case.

Certiorari to the Municipal Court of the City of Boston was granted Nov. 2, 1931, to review a cause in that court wherein Fred Armburg is plaintiff in a common law action of tort, and the Boston and Maine Railroad defend-

ant, and wherein final judgment was entered on Sept. 25, 1931 for the respondent herein, the plaintiff below, in the sum of $28,893.41.

The petitioner and the respondent are hereinafter respectively referred to as the defendant and the plaintiff.

At the trial the defendant requested, and the court refused, the following rulings, (R. pp. 24, 25):

11. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

14. Upon all the evidence the plaintiff is not entitled to recover in this action upon the following grounds and each of them:

(h) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

The facts were as follows, (R. pp. 4-23):

(R. 6) The plaintiff, while traveling in the course of his employment by the defendant as a section hand upon a railroad motor car operated over the tracks of the Boston and Maine Railroad by another employee of the defendant, Section Foreman Connell, was seriously injured. The motor car ran into a switch which had been set against it and was overturned, Armburg being thrown to the ground. A red signal at the switch stand was so set as to indicate that the switch was set against the motor car, but Connell did not pay any attention to this signal or heed the warning shouts of members of another section crew nearby.

It was agreed at the trial that the plaintiff was not employed in interstate commerce at the time of his injury but was then engaged in intrastate commerce.

The defendant was a common carrier of freight and passengers for hire, both intrastate and interstate, and was not a subscriber under the provisions of the Massachusetts Workmen's Compensation Law.

(R. 6) The court found as a fact that the cause of the injuries to the plaintiff was the negligence of Connell, the operator of the railroad motor car upon which the plaintiff was riding at the time of the accident, and also found and ruled that Connell in operating the railroad motor car at the time of the accident was a fellow servant of the plaintiff.

Evidence introduced by the defendant at the trial, briefly summarized, was as follows:

(R. 7) The Massachusetts Commissioner of Insurance approves the policy forms and rates for compensation insurance; (R. 8) a bureau composed of insurance companies writing compensation insurance in Massachusetts, called the Massachusetts Rating and Inspection Bureau, submits proposed rates to the Department of Insurance; these are approved or disapproved, as the case may be; there is a book called the Basic Rate Manual, a Manual of Workmen's Compensation Insurance, approved by the Commissioner of Insurance, in effect at the time of the accident to the plaintiff, containing the following:

(R. 8) "Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance. Under no circumstances shall a Compensation Insurance policy be written covering any part of a specific location of a given risk, leaving another part of the same location uninsured. If a

risk or a part of a risk is at a single specific location, such risk or such part of a risk shall be carried only by a single insurrance carrier.

(Fol. 9) "The following specific rules shall govern the treatment of payroll as the basis of premium for Compensation Insurance policies:

1. Division of Payroll

(a) "The term 'risk' as used in this Manual shall mean and include the entire operations of one employer within a given state."

(R. 9) The total main line trackage of the defendant is 2077.02 miles, of which 729.37 is in Massachusetts; a blueprint map of the Boston and Maine System was introduced; a copy of the monthly reports to the Interstate Commerce Commission for July, 1929, was introduced, showing (R. 14, 15) the total payroll and compensation, 2208 men on a daily basis paid $411,001; 15778 men on an hourly basis paid $1,921,971, and in train and engine service 3971 men paid $811,062, the three figures added together giving the total compensation for the month of July, 1929.

The annual report of freight commodity statistics of the Boston and Maine Railroad to the Interstate Commerce Commission for the year 1929 was introduced, showing (R. 18) that during that year the defendant handled 23,922,566 tons of freight, inclusive of both intrastate and interstate, for which it received $52,749,586. A witness estimated (R. 20, 21) that the total tonnage carried intrastate over the Boston and Maine Railroad to any other connecting carrier was a very small proportion, ten per cent or under; that approximately fifteen per cent of the total tonnage of freight carried originated in and terminated in the Boston and Maine Railroad, that in his opinion a very liberal approximation of the proportion of freight carried intrastate would be ten per cent or under.

The trial court found for the plaintiff. The case was reported to the Appellate Division of the Municipal Court of the City of Boston, and the Appellate Division dismissed the report, holding that the Massachusetts Workmen's Compensation Act applied to this defendant, (R. pp. 28-30) and that Sec. 66 of Chap. 152, General Laws, shut off the fellow servant defense.

The Appellate Division said, "This is a case purely of intrastate concern and regulation, and as to such matters we are clear that this defendant, remaining outside the compensation system by choice, does so on the conditions legislatively fixed." • • • "We feel sure that the ultimate decision must be that the legislature never intended a clear present to insurers by requiring insurance upon those whose duties and risks were such that there could be no collection, and the 'Pay-Roll Rules' appear to make such allowance." • • •

"Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured *which is the subject of insurance.* (Italics ours.) It is a purely gratuitous assumption on the part of the defendant that it cannot by proper proceedings compel the Commissioner to exclude non-collectible risks from the insurance, or that it cannot in like manner force the adjustment of premium rates upon the basis of real risks." • • •

"All beyond this is the fact that the legislature has changed the common-law defense of negligence of a fellow servant. It hardly needs argument that not even an interstate carrier has a vested right in such a rule, in its application to intrastate matters."

From the final decision of the Appellate Division, the defendant appealed to the Supreme Judicial Court, which

affirmed the order of the Appellate Division dismissing the report, the reasons being set forth at length in the opinion (R. pp. 31-41).

The Supreme Judicial Court of Massachusetts, in passing upon requests made by the defendant at the trial (Requests Nos. 7, 8, 9, 10 and 12 d, e, f, and g; R. pp. 24, 25), to the effect that the Massachusetts Workmen's Compensation Act was not applicable to the defendant, construed the Act as follows, (R. p. 32):

"At the outset it is to be observed as the basis of this opinion that the Act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce."

(R. p. 36) "An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance, and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court."

(R. p. 37). "The same employees may be engaged alternately during stated periods in intrastate and in interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to indicate that reasonably accurate estimates of the proportion of time of employees

spent in intrastate and interstate commerce cannot be made. The contrary cannot be assumed in the absence of proof."

(R. p. 40) "If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the Act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the Commissioner of Insurance requires that 'Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance.' As applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts, and those, if any, entitled to the benefit of St. 1927, Chap. 309, Secs. 2, 3. That is the only payroll of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce."

(R. p. 40) "If the defendant is advised that the rules of the Commissioner of Insurance do it an injustice, that does not render the act unconstitutional. The law doubtless affords remedies, if on proper representation that official does not make rules just and legal in their operation on the defendant.

"It cannot be presumed, in the absence of any evidence or finding, that a fair and equitable method of ascertaining and computing the premiums due from the defendant in respect to insurance of its employees engaged in intrastate commerce cannot be worked out if it desires to become an

insured employer under the act. Certainly we cannot take judicial notice that there is any such practical impossibility. The evidence in the present record does not require a finding of that nature. The defendant requested no ruling on this point, and hence it is not open to it."

In its petition for certiorari the defendant states its reasons relied upon, in substance as follows:

(Petition, pp. 7, 8) The Workmen's Compensation Act, in so far as it requires a railroad engaged in both interstate and intrastate commerce to insure its employees to the extent that they are engaged in intrastate commerce or otherwise be subject to actions at common law without the benefit of common law defences (negligence of fellow servant) is in violation of the Commerce clause of the Constitution, in that it imposes a burden upon interstate commerce, contending that (1) classification, for the purposes of such insurance, of the employees of a railroad engaged in both interstate and intrastate commerce between those engaged in interstate commerce and those engaged in intrastate commerce, and the separation of the employees' services as between the two classes of commerce, so that such a railroad can insure its employees in so far as they are engaged in intrastate commerce, is impossible; and (2) even if it were not impossible for a railroad corporation engaged in both interstate and intrastate commerce to insure to the extent that its employees are engaged in intrastate commerce, the burden involved in the segregation of the services and risks referable to such intrastate commerce and the requirement that such a railroad shall so insure or be subjected to actions at common law for injuries received by its employees, without the benefit of the common law defenses in question, constitute a burden upon interstate commerce in violation of the Commerce clause of the Constitution.

In the specification of errors (Supporting Brief, p. 5) the following appears:

> 4. (1) The court below erred in ruling and holding that Mass. Gen. Laws, Chap. 152 and Sec. 66 thereof, * * * are not in violation of the commerce clause * * *
>
> (2) The court below erred in ruling and holding that Mass. Gen. Laws, Chap. 152 and Sec. 66 thereof, * * * are not in violation of the commerce clause * * *

Attention is respectfully directed to the material difference between the specification of errors and the requests for rulings at the trial, "St. 1911, Chap. 751, Part 1, Sec. 1, now Gen. Laws, Chap. 152, Sec. 66, violates the commerce clause."

The plaintiff claims that the only state law which the trial court was requested to declare unconstitutional was the statute, in a single section, abolishing the common law defenses of fellow servant, assumption of risk, and contributory negligence.

This extended statement of the case is deemed necessary to correct inaccuracies and omissions in the petition for certiorari and the supporting brief.

Summary of the Argument.

I.

Two questions only—the one whether the defendant, a carrier, is wholly outside of the State Workmen's Compensation Act, Mass. Gen. Laws, c. 152; the other whether the State law doing away with the fellow servant defense is repugnant to the Commerce clause of the Constitution of the United States—were raised in the trial court, the Municipal Court of the City of Boston, reported to the Appellate Division, and on appeal were reviewed by the Supreme Judicial Court, under the Statute limiting such review to the questions presented in the trial court. As the interpretation of the Statute by the State Court will be adopted here, the first question is disposed of. The second question, arising upon requests for rulings that the single section of the Statute affecting the fellow servant defense violates the Commerce clause, is the only Federal question presented on this record, and as that question has been settled, it is no longer open. Therefore, jurisdiction is questioned.

II.

Intrastate commerce only is involved here. The plaintiff when injured was not engaged in interstate commerce. The state laws are construed to apply only to intrastate commerce in its limited sense,—that is, only such commerce as is within State jurisdiction—, and the power of the States to establish by legislation departures from the fellow servant rule is definitely settled. If an employee of a carrier is injured while engaged in interstate commerce the Federal law applies; if injured while engaged in intrastate commerce, the law of the State applies.

III.

If this Court decides to review the Massachusetts Workmen's Compensation Act in its entirety, then the plaintiff says that the Act applies only to the part of the defendant's business which is wholly within the field of State control and regulation; that if the defendant chooses to accept the Act and provide compensation for its employees thereunder, it will not be required to pay premiums upon any part of its payroll within the operation of the Federal Employers' Liability Act, or any other Federal law. The administration of the compensation system by authorized State officers under rules of practice long established and well known utterly excludes all interstate commerce and is limited to the part of the defendant's business clearly within State jurisdiction; this appears from parts of the State Court opinion not found in the defendant's brief, but presented here. In its decisions since 1911 the State Court has held that the fellow servant defense is not open to this defendant; it has limited the operation of the Workmen's Compensation Act to the classes of employment and injuries within the jurisdiction of the General Court. The origin, nature, methods, means, and operative field of State Workmen's Compensation Acts are discussed, and it is shown that the Massachusetts act, in its application to the intrastate commerce of the defendant as defined by the State Court to be only that commerce wholly within the field of local control, is not repugnant to the Constitution of the United States. Interpretations of the Commerce clause by this Court have settled the principles of the law applying to carriers. The Federal Employers' Liability Act covers the entire field of interstate commerce. The States are left free to legislate concerning injuries occurring in intrastate employment. Harmony exists between Federal and State laws as interpreted by

Federal and State courts. If the Massachusetts Workmen's Compensation Act is held unconstitutional, all carriers in Massachusetts if unwilling to subscribe to the modern system will be permitted to escape liability to their employees for injuries sustained while engaged in intrastate commerce.

Jurisdiction.

No undecided Federal question is here presented. The case is wholly intrastate; the plaintiff was engaged in intrastate commerce when injured; the rights and liabilities of the injured and the wrong-doer come under State, not Federal, law; the State Courts have not said or intimated that the State law or any part of it applies to any injuries within the field of the Federal Employers' Liability Act or for which recovery may be had under any Federal law; on the contrary, every field within Federal jurisdiction is expressly excluded.

All except two of the contentions made by the defendant at the trial were so completely disposed of by the evidence and findings that the defendant did not present them for review in the Appellate Division. (See Opinion of Appellate Division, R. 28.) The first question presented for review was whether as a matter of statutory interpretation the provisions of the Massachusetts Workmen's Compensation Act apply at all to a railroad corporation operating in both interstate and intrastate commerce. The Court held, "The Act in our opinion leaves no room for doubt as to the first question." The defendant is clearly within the scope of the Act to the extent only of so much of its business as is wholly within the field of local control; *i. e.*, that business over which the State and not the Federal government has undoubted jurisdiction, and as the interpretation of a state statute is held to be wholly within the

province of the State Courts, no constitutional question is presented. The second question as stated by the Appellate Division is whether "the provission of Sec. 66 shutting off in an action at law the defense tthat the injury was caused by the negligence of a fellow employee does not fall in its application to such a corporation because putting an undue burden on interstate commerce." This was disposed of by the Appellate Division after interpreting the Act as applying only to injuries wholly within the field of local control and local regulation in the following words (R. 30): "All beyond this is the fact that the legislature has changed the common-law defense of negligence of a fellow-servant. It hardly needs argument that not even an interstate carrier has a vested right im such a rule, in its application to intrastate matters. *New York Central Railroad vs. White*, 243 U. S. 188; *Hawkins vs. Bleakly*, 243 U. S. 210."

As the omission by the defendant in its discussion of the Opinion of the Appellate Division at p. 11 of its brief of the narrow scope of the two questions presented to that Court and of the plain conclusions of that Court thereon tends to confuse the issue reviewable upon appeal from that Court, attention is called to the following facts: It was the defendant and not the Court which assumed "the necessary inclusion for insurance of all employees"; the Court said (R. 30): "It is a purely gratuitous assumption on the part of the defendant that it cannot by proper proceedings compel the Commissioner to exclude non-collectible risks from the insurance, or that it cannot in like manner force the adjustment of premium rates upon the basis of real risks." The Court further held (R. 29): "This is a case purely of intrastate concern and regulation, and as to such matters we are clear that this defendant, remaining outside the compensation system by choice, does so on the

conditions legislatively fixed. Its motives which led to that choice, based on an alleged difficulty in conforming (R. 30) its methods of doing business to the mechanism of the compensatory system, are immaterial."

From the order of the Appellate Division dismissing the report the defendant appealed to the Supreme Judicial Court. The statute governing the report and appeal in this case, G. L., Chap. 231, Sec. 108, 109, is printed in full in the defendant's brief at p. 12. It entitles an aggrieved party as of right to have any ruling by a Justice of the Municipal Court reported to the Appellate Division. If the Appellate Division shall decide that there has been no prejudicial error in the ruling complained of, it shall dismiss the report. The appeal to the Supreme Judicial Court "shall not remove the cause, but only the question or questions to be determined."

Mass. Gen. Laws, Chap. 231, Sec. 109.

The plaintiff therefore contends:

1. That the first question which the Appellate Division decided, viz. that the defendant in that part of its business which is wholly within the field of local control and regulation is subject to the provisions of the State Workmen's Compensation Act, involves only the interpretation by the State Courts of a State statute, and that it is elementary that the interpretation by the State Courts of such a statute will be adopted by this Court; therefore, the first question raised and decided by the Appellate Division has been finally determined and is not now open to review.

Chicago, Indianapolis & Louisville Railway Co. vs. Hackett, 228 U. S. 559.

2. That the second question relates to the authority of the Legislature to change the common-law defense of negligence of a fellow servant in an action brought by an em-

ployee against an employer to recover damages for personal injuries sustained by the employee while engaged in work which is wholly within the field of State control and regulation by reason of the negligence of the employer. The power of the Legislature to modify or abrogate the common-law defenses has been passed upon and sustained by this Court. "This Court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow servant rule and other common law rules affecting the employer's liability for personal injuries to the employee."

New York Central Railroad vs. White, 243 U. S. 188, 198-200.

As the second question presents nothing more than the power of the Legislature to change the common-law rules, and that power has been definitely established, no substantial Federal question is presented upon this review.

The discussion in the opinion of the Supreme Judicial Court of the constitutional aspects of the Workmen's Compensation Act in general relates wholly to the interpretation of the Act as applying only to the field of local control and regulation. It is plain that that Court had in mind the statutory limitation of the review upon the appeal from the Appellate Division to "the question or questions to be determined." This is shown by the conclusion of the opinion (R. 41): "The essential points of the case at bar, so far as they relate (fol. 45) to interstate commerce, seem to us to be concluded against the contention of the defendant by the decisions in *New York Central Railroad vs. White*, 243 U. S. 188, and *Hawkins vs. Bleakly, id.* 210."

To sustain its contention that this Court has jurisdiction, the defendant must show that it specially set up a Federal right in the court below which was denied by the

highest court of the State. In *Chicago, Indianapolis & Louisville Railway Co. vs. Hackett*, 228 U. S. 559, this Court said:

"Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved, and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the full faith and credit clause furnishes no ground for reviewal." * * * "We conclude, therefore, that we are not concerned in the interpretation placed upon the Indiana act unless it be that that construction offends against some Federal right properly asserted and open to our consideration."

Chicago, Indianapolis & Louisville Railway Co. vs. Hackett, 228 U. S. 559.

Wabash Railroad Company vs. Hayes, 234 U. S. 86.

Argument.

(1) The power of the State to change the fellow servant defense is the only question open to review upon this record.

Seemingly the only question now open for review is the matter raised by the requests made at the trial that Sec. 1 of St. 1911, Chap. 751, Part 1 (now Sec. 66 of G. L., Chap. 152) violates the commerce clause, and is therefore void.

The statute referred to in the requests is:

Section 66. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury.

(2) This defense is generally abolished.

The fellow servant rule, in its application to injuries in interstate commerce, was abrogated by Congress in 1908, when the Federal Employers' Liability Act was passed. It has since been abrogated as to intrastate commerce by constitution in Arizona and by statute in nearly all of the other states, and Workmen's Compensation Laws have been generally adopted. This is so well known that citations seem unnecessary.

(3) Modification of fellow servant defense within the power of the State.

This court repeatedly has upheld the authority of the states to establish, by legislation, departures from the fellow servant rule and other common law rules affecting the employer's liability for personal injuries to the employee.

N. Y. Cent. R. R. vs. White, 243 U. S. 188; and cases cited.

(4) The plaintiff, when injured, was engaged in intrastate commerce.

This case is wholly intrastate. The plaintiff was not engaged in interstate commerce when injured; he was then engaged in intrastate commerce. If the injury occurs while the employee is engaged in interstate commerce, the Federal law applies; if the injury occurs while the employee is engaged in intrastate commerce, the state law applies.

Nogueira vs. N. Y., N. H. & H. R. R. Co., 281 U. S. 128.

St. Louis, Iron Mountain & Southern Railway vs. Hesterly, 228 U. S. 702.

Taylor vs. Taylor, 232 U. S. 363.

Seaboard Air Line Railway vs. Horton, 233 U. S. 492, 501.

Wabash Railroad vs. Hayes, 234 U. S. 86.

Illinois Central R. R. vs. Behrens, 233 U. S. 474.

Michigan Central R. R. vs. Vreeland, 227 U. S. 59, 66.

Toledo, St. Louis & Western R. R. vs. Slavin, 236 U. S. 454.

Raymond vs. Chicago, Milwaukee & St. Paul Railway, 243 U. S. 43.

(5) The Workmen's Compensation Act is interpreted by the State Courts; it applies only to business within State control and regulation. It does not apply to interstate commerce.

If the constitutionality, under the Commerce clause, of the entire statute, whereby the state of Massachusetts in the year 1911 adopted the system which is now in force, designed to provide compensation for workmen injured either with or without fault on the part of the employer in industrial accidents, now found in Chap. 152 of the General Laws of Massachusetts, and commonly called the Workmen's Compensation Act, is open to review, then it is respectfully submitted that under the interpretation of the state court, holding the act to apply only to employment wholly within the jurisdiction of the state, the law imposes no burden on interstate commerce. It is not shown that the proper officers of the state cannot determine under the state law a fair and reasonable amount to be paid by the employer based exclusively upon the wages paid employees

in intrastate commerce, wholly removed from all wages for work in matters outside of state control. On the contrary, it does appear that the employer may, if desirous of adopting the compensation system, become a subscriber by providing compensation for injuries arising out of, and in the course of, employment wholly controlled by state law, paying therefor the rates established by the proper officers of the state, and subject to review by the courts, based, as required to be administered by the state and its officers charged with duties under the compensation law, solely upon the intrastate work, its degree of hazard, and the wages paid therefor. The hazards of, or wages paid for, labor in interstate commerce, or any other work which is not wholly within the jurisdiction of the state, are not to be taken into account in determining the payment which the employer will be required to make if desirous of adopting the compensation system.

(6) Compensation acts held Constitutional.

The constitutionality of the New York workmen's compensation act, which is compulsory in its operation, and of the Iowa act, which like the Massachusetts act is optional, providing compensation for injury in industrial accidents within the field of local control, is established.

New York Central Railroad vs. White, 243 U. S. 188.

Hawkins vs. Bleakly, 243 U. S. 210.

(7) The interpretation by the State Court of a State statute is adopted by this Court.

It is elementary that the interpretation of a State statute by the State Court will be accepted by this Court, and the constitutionality of the statute tested under that view.

Gatewood vs. North Carolina, 203 U. S. 541.

Chicago, Indianapolis & Louisville Railway Co. vs. Hackett, 228 U. S. 559.

(8) The Act, as interpreted by the State Court as shown by parts of the opinion (omitted from the defendant's brief), applies only to "intrastate commerce" which is wholly within State control and regulation. "Intrastate commerce" does not include any work in any field of federal regulation.

There is no ground for the contention of the defendant that the intrastate commerce to which the Act applies includes any commerce within the scope of the Federal Employers' Liability Act, or any other Federal act.

The defendant evidently has overlooked, in its quotations from the opinion of the State Court, the limitation of the operation of the Massachusetts Workmen's Compensation Act to that part of the defendant's business which is wholly within the jurisdiction of the State, and the utter exclusion for any purpose whatever under the Act of all insurance requirements, provision for compensation, or other application of the Act to any employment, injury, or risk of injury, in interstate transportation or work so closely related to it as to be practically a part of it, or any other work for which in case of injury recovery may be had under any Federal law. This limitation of the operation of the Massachusetts Workmen's Compensation Act to matters within the jurisdiction of the State plainly appears in those parts of the opinions of the State Courts which are inadvertently omitted from the defendant's brief. The parts quoted by the defendant should be read with the context, to show the true sense in which the words "intrastate commerce" were used by the State Court. The parts of the opinion which follow show in italics every quotation found in the defendant's brief with page references, as B. 21, etc.; the context, not in italics, shows the qualified sense in which

the term "intrastate commerce" is used, and that the Act as interpreted does not apply to any business within any field appropriated by Congress.

Reviewing two questions—the one as to the inclusion of the defendant within the application of Chap. 152, Gen. Laws, the Workmen's Compensation Act; the other as to the constitutionality of Sec. 66 thereof abolishing the common-law defenses—on an appeal which brought up only the question or questions to be determined, the Supreme Judicial Court said:

(R. p. 32) "The defendant contends that the Workmen's Compensation Act (hereafter called the act) is not applicable to a railroad engaged in both intrastate and interstate commerce, and that hence the defense that the injury to the plaintiff was caused by a fellow servant is open to it notwithstanding the provision of G. L. c. 152, Secs. 66, 67, to the effect that such defense, with exceptions not here material, is denied to an uninsured employer. * * * * *"

"At the outset it is to be observed as the basis of this opinion that the act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce. It was said in Seaboard Air Line vs. Horton, 233 U. S. 492, at 501: *'It is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation* (R. 33) *by rail, all state laws upon the subject are superseded. Second Employer's Liability Cases,* 223 U. S. 1, 55.' *That statement applies also to all State laws thereafter enacted; they are void in their application to the subject of interstate commerce, no matter how phrased."* (R. 21, 22, 38.)

The relevant provisions of the Workmen's Compensation Act are these sections of G. L. c. 152:

"1. The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings: * * *

"(4). Employee, every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer. * * *"

(R. 34) "The words of Sec. 1 (4) just quoted are of broad import. It is difficult to confine by construction a definition of employee which states explicitly that it includes 'every person in the service of another under any contract of hire,' with two specified exceptions. The main purpose of the act reenforces the comprehensiveness of this definition. That purpose was to substitute a method of accident insurance, in place of the rights and liabilities established by the common law as modified by the employers' liability act and other statutes, for substantially all employees save the excepted classes, **to the extent that the attainment of that result was within the jurisdiction of the General Court.** It was a humanitarian measure enacted in response to the conviction that previous remedies had failed to give the measure of relief to employees for personal injuries arising out of their employment demanded by modern conditions. Although the act was optional and not compulsory, its general tenor disclosed a legislative aim to

secure its wide adoption and use. The interpretation of the act has been and ought to be, so far as reasonably practicable, to promote the accomplishment of its beneficent design. Express exclusion of two classes of employees from the operation of the act and the enactment of two amendments to the excluding clause are strong indications that all others within the natural purport of its language were to be included. If it had been the intent of the Legislature to exclude railroads engaged in interstate commerce from the operation of the act, it would have been a simple matter to state that intent in unequivocal language. **The words, purpose, and legislative history of the act as now phrased require the conclusion that it was intended to be applicable to all classes of injuries therein described within the competency of the legislative department.** 'The statute is as broad as the jurisdiction of the Commonwealth.' * * *"

(R. 35) "*The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce.* (B. 22, 39.) * * * It was said in *Wabash Railroad vs. Hayes,* 234 U. S. 86, 89-90:

'Had the injury occurred in interstate commerce * * * the Federal act undoubtedly would have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative. (Cases cited.) On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the State was controlling. *Illinois Central Railroad vs. Behrens,* 233 U. S. 473.' * * *"

(R. p. 35) "*There are numerous cases where decisions of State courts have been reversed because recovery had been*

allowed under workmen's compensation laws when, as the United States Supreme Court held, the injury had occurred while the employee was engaged in interstate commerce and where, therefore, the State laws were inapplicable and the Federal employers' liability act governed the rights and liabilities of the parties. (R. 22) * * * It does not appear to have been suggested in any of these decisions that railroad corporations were not subject to State workmen's compensation acts as to their intrastate business." * * *

(R. p. 36) "Both the words and the purpose of the act seem to require the conclusion that, with respect to the injury to the plaintiff occurring while he was engaged in intrastate commerce, the defendant is deprived of the defense that the injury was caused by a fellow servant of the plaintiff. * * * **The act does not require, and the decision in the Cox case does not mean, that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court.** It is an implied condition of all statutes that they were intended to operate only within the jurisdiction of the legislative body enacting them. * * *"

(R. p. 37) "It is often a question of difficulty whether a particular injury arose out of intrastate or interstate commerce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business. There are differences in certain instances as to the persons entitled to recovery and the persons to whom the amount recovered may ultimately be payable under the Federal employers' liability act and under the workmen's compensation act. These and other differences appear to us to constitute merely difficulties of a kind not infrequently encountered in the practical administration of affairs, but not to amount to insurmountable obstacles in the way of construing the scope of the statute according to its words and purpose." (B. 43, 44.)

(R. p. 37) "The same employees may be engaged alternately during stated periods in intrastate and interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to indicate that reasonably accurate estimates of the proportion of time of employees spent in intrastate and interstate commerce cannot be made. The contrary cannot be assumed in the absence of proof. It may be troublesome for the defendant to establish a basis for the insurance of the portions of its employees engaged in intrastate commerce. (B. 41, 45.) That, however, is a legislative and not a judicial question. We can only interpret the statute as it was framed. * * *"

(R. p. 38) "The intention of the General Court in enacting any statute must be ascertained, not alone from the

literal meaning of its words, but from a view of the whole system of which it is but a part, and in the light of the common law and previous statutes on the same subject. * * * Giving full weight to that principle, *we think that the act is applicable to the defendant as to its employees while engaged in intrastate commerce.* (B. 13, 39.)

"The defendant contends that thus interpreted the act is unconstitutional as applied to the defendant, in that it imposes an undue burden upon interstate commerce contrary to Art. 1, Sec. 8, of the Constitution of the United States. (B. 40) **No statute of the Commonwealth can impose a burden upon interstate (R. p. 39) commerce. That is fundamental under our dual system of government.** * * *

In *Sherlock vs. Alling*, 93 U. S. 99, at 103, it was said:

'In conferring upon Congress the regulation of commerce it was never intended to cut off the States from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' *Pennsylvania Railroad vs. Hughes*, 191 U. S. 477, 488. *Missouri Pacific Railway vs. Castle*, 224 U. S. 541, 544-545. *Chicago, Milwaukee & St. Paul Railway vs. Solan*, 169 U. S. 133, 137-138. The workmen's compensation act is an exercise of the police power of the Commonwealth. *Mountain Timber Co. vs. Washington*, 243 U. S. 219, 238-239. *Madera Sugar Pine Co. vs. Industrial Accident Commission*, 262 U. S. 488, 501-502.

"The provisions of G. L. c. 152, as herein interpreted, do not in our opinion burden the interstate commerce of the

defendant. (B. 40.) *Whether the defendant shall avail itself of that act is wholly optional with it. If it does not insure in accordance with its provisions, it cannot, in common with all other employers in like situation, interpose the defenses of assumption of risk, contributory negligence, or the fellow servant doctrine in actions for personal injury brought against it by its employees engaged in intrastate commerce.* (B. 14, 61.) It was said touching this subject in *Opinion of the Justices,* 209 Mass. 607, at page 610:

"The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defenses (as it has to some extent in the employers' liability act) as in its wisdom in the exercise of powers entrusted to it by the Constitution it deems will be (R. p. 40) best for the "good and welfare of this Commonwealth. Const. Mass. c. 1, Sec. 1, art. 4. See *Missouri Pacific Railway vs. Mackey,* 127 U. S. 205; *Minnesota Iron Co. vs. Kline,* 199 U. S. 593.' "

"To the same effect are *New York Central Railroad vs. White,* 243 U. S. 199, 200, and cases cited, and *Silver vs. Silver,* 280 U. S. 117, 122. *If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the commissioner of insurance requires that 'Compen-*

sation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of insurance.' As applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts and those, if any, entitled to the benefits of St. 1927, c. 309, Sec. 2, 3. That is the only payroll of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce. If such insurance would have any effect on interstate commerce, it would be purely incidental and therefore would infringe upon no constitutional inhibitions. (B. 14, 40, 41.) * * *

"If the defendant is advised that the rules of the commissioner of insurance as at present framed do it an injustice, that does not render the act unconstitutional. The law doubtless affords remedies if on proper representation that official does not make rules just and legal in their operation on the defendant.

"It cannot be presumed, in the absence of any evidence or finding, that a fair and equitable method of ascertaining and computing the premiums due from the defendant in respect (R. p. 41) to insurance of its employees engaged in intrastate commerce cannot be worked out if it desires to become an insured employer under the act. Certainly we cannot take judicial notice that there is any such practical impossibility. The evidence in the present record does not require a finding of that nature. The defendant requested no ruling on this point and hence, it is not open to it.

"The essential points of the case at bar, so far as they relate to interstate commerce, seem to us to be concluded

against the contention of the defendant by the decisions in New York Central Railroad vs. White, 243 U. S. 188, *and Hawkins vs. Bleakly, id.* 210." (B. 61.)

(9) The fellow servant defense has not been open to the defendant in Massachusetts since the year 1911.

In *Henshaw vs. Boston & Maine Railroad,* 222 Mass. 459, 561, the court held, "The defendant was not a subscriber under St. 1911, Ch. 751, so the only questions before the jury are in regard to the defendant's negligence and the amount of damages the plaintiff was entitled to recover."

Henshaw vs. Boston & Maine Railroad, 222 Mass. 459.

In *Lyford vs. Boston & Maine Railroad,* 227 Mass. 10, the court held, "As the defendant does not appear to have been a subscriber under the Workmen's Compensation Act, the decisive question is whether there was any evidence tending to show negligence on the part of the defendant or its servants."

Lyford vs. Boston & Maine Railroad, 227 Mass. 10.

In *Dooley vs. Sullivan,* 218 Mass. 597, it was held, "The defendants are not subscribers under the terms of the statute. It follows that neither contributory negligence, the negligence of a fellow employee, nor the plaintiff's assumption of the risk of injury, is open to the defendants as a defense to the action. St. 1911, Ch. 751, Part 1, Sec. 1.

Dooley vs. Sullivan, 218 Mass. 597.

In *Pitcher vs. Worcester Consolidated Street Railway,* 240 Mass. 185, it was held, "It was admitted that the de-

fendant was not insured under the Workmen's Compensation Act and that the negligence of the plaintiff, his assumption of the risk, and the negligence of a fellow employee, were not grounds of defense."

Pitcher vs. Worcester Consolidated Street Railway, 240 Mass. 185.

(10) The defendant is not liable under State law for injuries sustained in interstate commerce.

The Act has been limited in previous cases to the field of local control. In *Lynch vs. Boston & Maine Railroad*, 227 Mass. 123, 126, it was held, "If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service the carrier's liability is controlled and must be determined solely by the Federal law; if in the latter service, such liability rests wholly upon the State law.

Lynch vs. Boston & Maine Railroad, 227 Mass. 123.

In *Duart vs. Simmons*, 231 Mass. 313, 320, it was held, "Although our Act is constitutional in its general aspects both under the State and Federal constitution, *Young vs. Duncan*, 218 Mass. 346, *Hawkins vs. Bleakly*, 243 U. S. 210, we feel constrained by the controlling authority of the *Jensen* case *(Southern Pacific Co. vs. Jensen*, 244 U. S. 205) to hold that it does not apply to injuries having a maritime origin."

Duart vs. Simmons, 231 Mass. 313, 320.

In *Corbett vs. Boston & Maine Railroad*, 219 Mass. 351, 356, it was held, "The Federal act in the field covered by it

supersedes all State statutes. As to matters within the scope of the Federal power, legislation by Congress is supreme. So long as Congress had not acted as to liability for injuries received by employees of railroads while engaged in interstate commerce, legislation by the State touching that subject, being within the police power, was valid. But when Congress exerted its jurisdiction to regulate in this respect commerce between the States, State statutes previously operative in that sphere yielded to its paramount and exclusive power. * * * If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the Federal law; if in the latter service, such liability rests wholly upon the State law."

Corbett vs. Boston & Maine Railroad, 219 Mass. 351, 356.

In *Toland's case*, 258 Mass. 470, 472, the court stated, **"The Workmen's Compensation Act therefore must be and is interpreted as intended only to operate upon the classes of employment and injury within the jurisdiction of the General Court.** On the other hand, the words of the Act and its chief aim render the conclusion irresistible that the General Court intended to make the Act applicable to all classes of injuries therein described which are within its jurisdiction.

Toland's case, 258 Mass. 470, 472.

The Massachusetts Workmen's Compensation has not been shown to violate the Commerce clause of the Constitution.

"The action of the State must be treated as correct unless the contrary appear."

Hendrick vs. Maryland, 235 U. S. 610, 624.

(11) The origin, nature, methods, means, and operative field of State Workmen's Compensation Acts.

By the common law as administered in the several states, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work, subject only to the right to be indemnified for any loss inflicted by wrong-doers. The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs, the scope of his liability for wrongs being amplified by the doctrine of *respondeat superior*. This legal liability, which in theory applied between employer and employee as well as between others, came in the course of time to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses, the doctrines of fellow servant's negligence, of assumption of risk, and of contributory negligence, rose and flourished. When applied to huge organizations and hazardous occupations they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress, insistent; and the efforts to secure remedial legislation widespread. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing the defense. Between the passage of that act and the passage of the First Federal Employers' Liability Act, fifty years elapsed. In those fifty years only four more states had wholly abolished the defense of fellow servant's negligence. Meanwhile, the number of accidents to railroad employees had become appalling. In the year 1905-1906 the number killed while on duty was 3,807 and the number injured 55,524. The promoters of reme-

dial action, unable to overcome the efficient opposition presented in the legislatures of the several states, sought and secured the powerful support of the President. Congress was appealed to and used its power over interstate commerce to afford relief. Not one of the thirty-seven states or territories which now have workmen's compensation laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress It then had under consideration the first compensation law for Federal employees, which was enacted May 30, 1908 (35 Stat. 556). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of the Federal Employers' Liability Act of April 22, 1908.

In the effort to remove abuses, a study had been made of facts, and of the world's experience in dealing with industrial accidents; that study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation, even if the law were perfected and its administration made exemplary. For in probably a majority of cases of injury there was no assignable fault, and in many more it must be impossible of proof.

It was urged: Attention should be directed, not to the employers' fault, but to the employees' misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as

to insure actual protection against loss or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual, because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practiced, society, which is served thereby, should in some way provide the protection. To attain this end, cooperative methods must be pursued; some form of insurance—that is, some form of taxation. Such was the contention which has generally prevailed. Thus out of the attempt to enforce individual justice grew the attempt to do social justice.

It is the State which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him, even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the financial burden of dependency, if provision be not otherwise made. Upon the State falls directly the far heavier burden of the demoralization of its citizenry, and of the social unrest which attend destitution and the denial of opportunity. Upon the State also rests, under our dual system of government, the duty owed to the individual to avert misery and promote happiness so far as possible.

The principle underlying workmen's compensation laws is the same in all the states. The methods and means by which that principle is carried out vary materially. The

principle is that of insurance, the premiums to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributing groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-insurer; whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded; on all these questions the laws of the several states do, and properly may, differ radically. What methods and means the State shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate, rests (subject to constitutional limitations) wholly within the judgment of the State.

It is misleading to speak of the new obligation of the employer to contribute to compensation for injuries to workmen as an increase of the "employer's liability." It is not a liability for a violation of a duty. It is a direct—a primary—obligation in the nature of a tax. It is but the application of the modern system, evolved from the realization that the duty of the state to the individual to avert misery and promote happiness so far as possible requires laws not only to protect the individual under the ancient theory of making the wrong-doer indemnify him whom he has wronged, but, recognizing the inability of the injured wage earner to support himself or his family, to protect society from the financial burden of dependency which must be borne by it, and from the demoralizing results of poverty, with its concomitants of vice and crime. Commissions appointed in many of the states made a careful study of industrial accidents in America, England, and Germany,

The conclusions of all of these commissions were substantially the same. Recommendations were made and laws enacted in most of the states alike in principle but properly varying in methods and means by which that principle is carried out, all founded upon the sound doctrine that industrial accidents are an incident of industry and that the care and protection of the injured should be provided for on the basis of compensation instead of the basis of a remedy for the wrong.

New York Central Railroad Company vs. Winfield, 244 U. S. 147.

The field within which State laws may operate is limited to that business which is wholly within the jurisdiction of the Legislature of the State. The field which Congress, under the Commerce clause of the Constitution, has appropriated is excluded from the operation of every State law. The Federal Employers' Liability Act covers the entire field of injuries to employees of an interstate carrier by rail which occur in interstate transportation, or in work so closely related to it as to be practically a part of it, inclusive of injuries which occur without any negligence of the carrier. The Federal act excludes the operation of state workmen's compensation acts in the entire field which it occupies. The term "intrastate commerce" as used in connection with the field of operation of State compensation laws means only so much of the business of the carrier as is wholly outside of any field which Congress has appropriated; it covers only that business which it is within the province of the Legislature of the State to regulate. This rule was clearly recognized and plainly stated by the Supreme Judicial Court of Massachusetts in the instant case. It is the same construction which the same

Court has adopted and followed ever since the Act became operative, twenty years ago. The expression "intrastate commerce" frequently appearing in the opinion in the instant case follows the interpretation of the Act as applying only to branches or departments or kinds of business within the jurisdiction of the General Court of Massachusetts and as not requiring insurance of branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court, and therefore necessarily outside the scope of the Act, is limited by the preceding words of utter exclusion, to that intrastate commerce which is wholly within the field of local control. The consideration in their entirety of the opinions of the Appellate Division and of the Supreme Judicial Court in the instant case plainly shows that the words "intrastate commerce" are used in the more limited sense and are qualified by the limitations of the scope of the Act to the field of local control.

(12) Compensation costs not chargeable against interstate commerce.

The defendant says that insurance premiums to provide workmen's compensation would be payable out of its general funds, and therefore burden interstate commerce. The earnings of the defendant through its intrastate commerce presumably go into its general treasury. The payroll in the field of local control and regulation, as well as sums paid for damages for personal injuries in that field, ought to be allocated to the intrastate part of the carrier's business. So far as the plaintiff has been able to ascertain no court has ever held any payment for workmen's compensation to burden or affect interstate commerce. There are certain operating expenses of the business of a carrier

which have never been held a burden upon interstate commerce. The cost of management of the business by executive officers, usually consisting of a President, Treasurer, Chairman of the Board, Executive Committee, and Directors, is not considered a burden. These officers are men of recognized ability in their chosen field. They determine the value of their own services, and establish their salaries accordingly. They purchase locomotives, cars, rails, materials, and supplies. They incur and pay all bills incident to the business of the carrier; yet no carrier has ever urged that these expenditures, however vast in amount, burden interstate commerce.

(13) The administration of the compensation system is governed by established practice; risks are classified according to hazard; the cost is limited to the subject of insurance.

The general methods of application of the main provisions of all workmen's compensation acts of the class or kind in force in Massachusetts, where the acceptance of the act is optional alike to employer and employee, are the same in all of the states which have adopted the optional plan. Twenty or more years ago, when compensation laws first came into force, practices were adopted which have since become so universal and so generally understood that they may be said to be matters of common knowledge.

Under established practices the main questions,—which are, the occurrence of the injury; whether it arose out of and in the course of the employment; and the extent to which the employee is disabled;—are quickly and finally determined by qualified state officers. The various details involved in the acceptance of an Act, commonly called be-

coming a subscriber, are in like manner attended to, considered, decided, and properly adjusted by qualified state officers upon evidence submitted, often informally, by the interested parties, the employer, the insurer, and the employee. Rights of appeal or review are preserved so that proper judicial review is safeguarded.

The following general facts are so well known that citation of authority or detailed discussion seems unnecessary:

(a.) The cost of providing for the payment of the compensation (a fixed percentage of average weekly earnings, with some additions for specific injuries) is based upon the amount of wages paid and the degree of hazard which experience has shown to be involved in each particular line of work.

(b.) The employees are grouped or classified so that the amount required to pay for the compensation guaranteed may not be too great, as to those whose work is comparatively free from danger of occupational injury, nor too small to protect those whose work is attended with serious danger of injury. Here, again, practical experience is the guide.

(c.) The payments to provide compensation are estimated in the first instance from figures submitted by the employer showing the probable number of men to be employed in the several groups and the wages they will probably earn; the required percentages of the estimated payrolls, according to the rates established by the proper officers of the state as fair and adequate to provide compensation for the men who may suffer injury in each group, is then paid by the employer. Such payments, necessarily based upon the employer's own estimates, are subject to adjustment from time to time, usually at the end of each

year, when books are audited and the exact amount of wages received by employees in the several groups is ascertained, and accounts are then balanced between employers and insurers and settled on a practical business basis. Any disagreement between employer and insurer is subject to judicial determination and review.

Plainly the authorized officers of the state can, must and will, if the defendant chooses to become a subscriber, ascertain and measure the degree of hazard attending every occupation which the state may lawfully regulate, group the employees according to the hazard, and determine the payment required to provide compensation, according to the danger of injury to which the employees in each group are exposed. They will also perform their duties in all matters of accounting, requiring the inclusion therein of all business required by law to be included, and the exclusion therefrom of all business required by law to be excluded. Thus, as the Appellate Division well said, (R. 30) "It is a purely gratuitous assumption on the part of the defendant that it cannot by proper proceedings compel the Commissioner to exclude non-collectible risks from the insurance, and that it cannot in like manner force the adjustment of premium rates upon the basis of real risks."

(14) The defendant can accept the Act if it chooses.

The full and proper administration by the State of Massachusetts of its system of workmen's compensation is within the power reserved to the States under the Constitution. It extends, of course, no farther than the field of local control and regulation; but within that field the power of the state to administer the law is established beyond controversy. If the defendant desires to provide the measure of

compensation fixed by law for its employees who suffer injury arising out of and in the course of their employment, the State will ascertain the cost, fairly and equitably, based upon the percentages of the payroll of the employees in the extra-hazardous, hazardous and non-hazardous branches of its intrastate business, required to provide compensation, limiting such payroll to business which is wholly within State control and regulation, and utterly excluding therefrom all service in the field covered by Federal law, and will properly group the different risks and classify the employees according to hazard, and protect the defendant against any overcharge. The State of Massachusetts has pledged its faith to administer the law in accordance with the limitations clearly stated in the instant case.

(15) The defendant's contention that it will meet insurmountable difficulty if it chooses to become a subscriber is unsupported. The record is bare. There is no such presumption, and it is a matter of common knowledge that the cost can and will be determined upon a fair and equitable basis.

The defendant assumes that it might be unable to ascertain the amount of its employees' wages in that service which is wholly within state control, but it offered no evidence upon that point at the trial. The Constitution does not deny to the states the power to ascertain, unless they encroach upon some field occupied by Congress, "a fair and equitable method of computing the premiums due." (R. p. 40) "It cannot be presumed, in the absence of any evidence or finding, that a fair and equitable method of ascertaining and computing the premiums due from the defendant in respect to insurance of its (R. p. 41) employees engaged in intrastate commerce cannot be worked out if it

desires to become an insured employer under the act. Certainly we cannot take judicial notice that there is any such practical impossibility. The evidence in the present record does not require a finding of that nature. The defendant requested no ruling on this point and hence it is not open to it."

(16) Competent governmental authority in each field of regulation should be recognized.

The practical administration of the compensation system by the State, within the field of local control, is no more difficult than many other problems which have arisen from the complexities of modern industries operating in both interstate and intrastate commerce, and necessarily regulated by Federal law in their interstate business and by State law in the other part of their business, which is in the field left to the State.

"The separation of intrastate and interstate property, revenues, and expenses of the company is important, not simply as a theoretical allocation to two branches of the business; it is essential to the appropriate recognition of the competent governmental authority in each field of regulation."

Smith vs. Illinois Bell Telephone Co., 282 U. S. 133, 148.

(17) Employment in interstate commerce clearly defined.

A simple rule for the determination of that part of the service of the employees of a carrier which is covered by the Federal Employers' Liability Act has been clearly stated, and is the test for determining (if the defendant chooses to become a subscriber) whether the employee is engaged in interstate commerce, or in work within state control.

"Was the employee at the time [of the injury] engaged in interstate transportation, or in work so closely related to it as to be practically a part of it."

Shanks vs. Delaware, Lackawanna & Western R. R., 239 U. S. 556, 558.

Chicago and North Western R. R. vs. Bolle, ... U. S. .... (No. 60 Oct. Term 1931, Nov. 23, 1931).

Chicago and Eastern Illinois R. R. Co. vs. Industrial Commission of Illinois, ... U. S. .... (No. 79, Oct. Term, 1931, Jan. 4, 1932).

"It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as carrying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term."

Chicago and North Western Railroad vs. Bolle, ... *U. S.* .... (No. 60, Oct. Term 1931, Nov. 23, 1931).

(18) The Workmen's Compensation Act, interpreted to apply to that part of the defendant's business only which is wholly within the field of State regulation and control, applies to the defendant in the instant case.

The Commerce clause of the Constitution has been interpreted so many times and so clearly that many rules controlling the operations of carriers in both interstate and intrastate commerce are settled and generally understood. The power of Congress to regulate interstate commerce, even though such regulation also affects intrastate commerce, is plenary. Until Congress takes possession of a particular field through the exercise of its Constitutional power, the states are free to legislate; State laws in the field are superseded when Congress acts, and thereafter have no force or effect. This power of Congress is exclusive and has no limitations other than such as arise from the Constitution itself. Congress may adopt measures effectually to prevent every unreasonable, undue, or unjust obstruction to, burden upon, or discrimination against interstate commerce, whether it results from state regulation or the voluntary acts of carriers. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. The states have the undoubted right to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government. Thus, a State may impose a license tax upon a telegraph company on account of business done wholly within the state. A state statute imposing a tax on the privilege of running sleeping cars over railroads, which in terms applies strictly to business done in the transportation of passengers taken up at

one point in the state and transported wholly within the state to another point therein, is not violative of the Commerce clause. The fact that a railroad company is in a general sense engaged in interstate commerce does not prevent the operation of a Workmen's Compensation Act, but no state Workmen's Compensation Act can apply to an employee of an interstate carrier when he is engaged in interstate commerce or other work where recovery may be had under federal law in case of injury. Railway cars are not exempt from attachment under State laws, though they may have been, or are intended to be used in interstate commerce. Sums of money due from other carriers as the non-resident defendant carrier's share of the freight on interstate shipments are not exempt from garnishment under the State laws. States may make ordinary police regulations, even to the extent of requiring that transportation of freight shall be suspended on Sunday, without violating the Commerce clause. States are not permitted to impose any tax upon franchises conferred by the United States for constructing a railroad across the state and other states and taking toll therefrom, nor can states impose any tax upon the interstate business of a carrier, but states may tax the purely intrastate business. They may tax cab service maintained within the state by a carrier. States may establish inspection, quarantine, and other regulations to govern the ports of the state. The general rule is that Congress alone can regulate all interstate commerce, including all interstate transportation and matters so closely connected therewith that its regulation thereof is essential to the full exercise of its regulatory power over interstate commerce, and every such regulation by Congress utterly excludes the operation of any State law affecting the same matter. If there is conflict between Federal and State laws, State laws must yield. If there is no such conflict, State laws

enacted under the powers reserved to the states are valid. The field of which Congress has taken possession is to be determined by the law itself. The field of which Congress has not taken possession is left to the operation of State laws until Congress acts. Thus, in enacting the Federal Employers' Liability Law Congress covered the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This act was passed after the decision in the first *Employers' Liability* cases, 207 U. S. 463 holding the first Employers' Liability statute, enacted in 1906, unconstitutional because it included intrastate commerce, over which Congress had no control. The present Act was drafted and passed in 1908, shortly following a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several states only the injuries occurring in intrastate employment. This Act was intended to be as comprehensive of injuries occurring without negligence, as to which class is impliedly excludes liability, as it is of those as to which it imposes liability. It is a regulation of the carrier's duty or obligation as to both. It covers the field of injuries occurring either with or without negligence in interstate commerce, and to that extent supersedes all State laws covering the same field by reason of the supremacy of the national authority, but it leaves the states free to legislate concerning injuries occurring in intrastate employment. Where the injury occurs outside of interstate commerce, the Federal act does not apply, and the law of the state is controlling.

New York Central Railroad Co. vs. Winfield, 244 U. S. 147.

Wabash Railroad Co. vs. Hayes, 234 U. S. 86, 89.

Employers' Liability Cases, 207 U. S. 463.

Second Employers' Liability Cases, 223 U. S. 1.

Seaboard Air Line Railway vs. Horton, 233 U. S. 492.

St. Louis, Iron Mountain & Southern Railway vs. Hesterly, 228 U. S. 702.

Taylor vs. Taylor, 232 U. S. 363.

Addyston Pipe and Steel Company vs. United States, 175 U. S. 211, 247.

Sands vs. Manistee River Improvement Co., 123 U. S. 288, 2.

Mountain Timber Company vs. Washington, 243 U. S. 219.

Minnesota Rate Cases, 230 U. S. 352.

Pullman Company vs. Richardson, 261 U. S. 330.

Pullman Company vs. Kansas, 216 U. S. 56.

Postal Telegraph Company vs. Fremont, 255 U. S. 124.

New York Central Railroad Co. vs. White, 243 U. S. 188.

New York Central Railroad Co. vs. Winfield, 244 U. S. 147.

Hennington vs. Georgia, 163 U. S. 318.

Pennsylvania Railroad Co. vs. Knight, 192 U. S. 21.

Mutual Film Corporation vs. Ohio, 236 U. S. 230.

Louisiana Public Service Commission vs. Texas and New Orleans Railroad Company, ... U. S. .... (Nos. 36, 37, October Term, 1931, Nov. 23, 1931).

(19) The State law as interpreted in the instant case is in harmony with Federal law, and the fellow servant defense is not open under either law.

There is harmony between the Federal and State laws.

With the fellow servant defense abolished by statute in Massachusetts in action at common law to recover damages for injuries sustained by employees in the course of their employment in work wholly within State control, and the fellow servant defense abolished in actions by employees of carriers to recover for injuries caused by the carriers' negligence when engaged in interstate commerce, the employees of a carrier have substantially the same remedies for wrongs resulting from injury through negligence whether they happen to be engaged at the moment of injury in interstate or intrastate commerce. Under our dual system of government, interstate commerce is regulated by Congress. So far as Congress has acted in such regulation, all state laws are superseded, but in the remaining field of commerce, which is left to the regulation of the states, reasonable regulation by State laws, including the abrogation of the common law defenses and the adoption of the modern compensation system in place of common law actions, is not repugnant to the Constitution of the United States. Thus, the Federal and State governments, each in its own field, regulate commerce without conflict.

The defendant has acquiesced in the construction of the state statute abolishing common law defenses for more than twenty years. From such long acquiescence it is to be inferred that no valid ground of objection exists.

It would destroy all uniformity of liability of a carrier for injuries to its employees through negligence of other employees transacting the carrier's business to hold that

the fellow servant defense, which is not open in cases under the Federal Employers' Liability Act, is open in common law actions in cases where the employee is not engaged in interstate commerce when he suffers the injury. If the defendant's contention is sustained, and the fellow servant defense is held open to the defendant in the instant case, every carrier by rail in Massachusetts can escape all liability for injuries which its employees may suffer while engaged in intrastate commerce through the negligence of employees in the service of the carrier; a heavy financial burden will be imposed upon society, or the state, instead of the industry from which it sprung, and the defendant, and other carriers, if unwilling to subscribe to the modern system of compensation and protected by law against liability in damages, will be permitted under the Constitution to let those of their injured employees who are not engaged in interstate commerce at the time they are hurt lie and suffer where they fall.

Respectfully submitted,

CLARENCE W. ROWLEY,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
Petitioner,

v.

FRED ARMBURG,
Respondent.

BRIEF, AMICUS CURIAE

(In behalf of the Petitioner).

JOHN M. GIBBONS,
EUGENE J. PHILLIPS,
HENRY W. LAWLOR.

Supreme Court of the United States

BOSTON & MAINE R. R.
Petitioner,

v.

FRED ARMBURG,
Respondent.

BRIEF, AMICUS CURIAE

Statement

This brief is filed by leave of this Honorable Court, and with the consent of counsel for the petitioner and the respondent. We have attempted to supplement the argument of the petitioner upon the points as set out in their brief.

In the opinion of the Supreme Judicial Court of Massachusetts filed on September 12, 1931, Advance Sheets p. 1759, the provisions of the Workmen's Compensation Act, General Laws of Massachusetts, Chapter 152, were held applicable to railroads engaged in interstate and intrastate transportation. This law was held constitutional by the Supreme Judicial Court of Massachusetts in The Opinion of the Justices, 209 Mass. at p. 607. The provisions of the Workmen's Compensation Act of Massachusetts has not been reviewed by this Court in any prior proceeding involving its constitutionality.

Although the construction of the statute adopted by the state court of last resort is binding upon this Court, it is not concluded by its reasoning but must exercise an independent judgment when called upon to determine the federal question as to whether the Act as construed and applied is repugnant to the restrictions of the provisions of the Constitution of the United States or its amendments.

Ward & Gow v. *Krinsky*, 259 U.S. 503.

See also *Atchison T. & S.F. Ry. Co.* v. *Railroad Commission*, 51 S.C. Rep. 553.

In this proceeding the petitioner is challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause and it is not necessarily bound by the legislative declarations of purpose. It is open to the petitioner to show that in their practical operation provisions of the said Workmen's Compensation Act directly burden or destroy interstate commerce.

Foster-Fountain Packing Company v. *Haydel*, 278 U.S. 1.

The decision of the state court in this instance being in contravention of the legislation of Congress to regulate

interstate commerce was adverse to the petitioner and, therefore, gives rise to the right of review in this Court.

Pennsylvania R.R. Co. v. *Hughes,* 191 U.S. 477.

By numerous decisions this Court has held that in the absence of congressional legislation the state may constitutionally impose taxes, enact inspection laws, quarantine laws, and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce. But, the commerce clause of the Constitution, of its own force, restricts the state from imposing direct burdens upon interstate commerce.

Missouri ex. rel. v. *Kansas Natural Gas. Co.,* 265 U.S. 298.

And "It is elementary that a state may tax property in order to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. *Pullman Co.* v. *Richardson,* 261 U.S. 330, 338, and cases cited. And it must appear that one engaged exclusively in interstate business would not be subject to the imposition, and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business." *Sprout* v. *South Bend,* 277 U.S. 163, 171, and cases cited.

New Jersey Bell Tel. Co. v. *State Board of Taxes,* 280 U.S. 338, 346.

In the case of *United States Express Co.* v. *Minnesota*, 223 U.S. 335, 345 which upheld the constitutionality of a Minnesota act taxing express companies, this Court said:

> "The right of the state to tax property, although it is used in interstate commerce, is thoroughly settled" . . . "The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, although in the guise of taxation, impose real burdens upon interstate commerce as such." and at page 347, that the act in question would "not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state." And, in this decision the language used by Justice Holmes in *Maine* v. *Grand Trunk R. Co.*, 142 U.S. 217 was quoted from as follows:
>
> "On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can."

In the opinion of this Court in the case of *Louisiana Public Service Commission, et al,* v. *Interstate Commerce Commission,* decided November 23, 1931, it was said:

> "The power of Congress to regulate interstate and foreign commerce is exclusive and has no limitations other than such as arise from the Constitution itself. *Gibbons* v. *Ogden,* 9 Wheat. 1, 197. The Congress may

adopt measures effectually to prevent every unreasonable, undue or unjust obstruction to, burden upon or discrimination against interstate commerce whether it results from state regulation or the voluntary acts of carriers."

From the decisions in these cases referred to above and other cases of a similar nature involving state tax laws, it will be observed that such laws are valid when applied solely to commerce within a state and not a direct burden upon the commerce itself.

Citizens National Bank v. *Durr*, 257 U.S. 99.
New York, New Haven & Hartford R.R. Co. v. *New York*, 165 U.S. 628.
Missouri v. *Kansas Gas Co.*, 265 U.S. 298, 307.
East Ohio Gas Co. v. *Tax Commission of Ohio*, 51 S.C. Rep., 499.
Hanley v. *Kansas City S.R. Co.*, 187 U.S. 617.
Oklahoma v. *Wells Fargo & Co.*, 223 U.S. 298.
Kansas City Ry. v. *Kansas*, 240 U.S. 227.
Shafer v. *Farmers Grain Co.*, 268 U.S. 189.
Massachusetts v. *Western Union Tel. Co.*, 136 U.S. 40.

"And while interstate commerce can not be regulated by a state by the laying of taxes thereon, in any form, *yet whenever the subjects of taxation can be separated* (italics ours) so that that which arise from interstate commerce can be distinguished from that which arise from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory."

Lehigh Valley R. Co. v. *Pennsylvania*, 145 U.S. 200.

In the case of *Garvey* v. *Wesson*, 258 Mass. 48, the Supreme Judicial Court of Massachusetts said:

"If the transaction was, in and of itself, foreign commerce, we have no doubt that the demurrers should have been sustained. This court has, in substance, determined that the statutes (Sts. 1884, c. 330; 1895, c. 157; 1900, c. 280; 1903, c. 437) which go to make up the present G.L.c. 181, sec. 5, are not to be taken to apply to foreign corporations engaged solely in interstate commerce. *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239, 240, 241, citing *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U.S. 114. They otherwise would be unconstitutional. The same reasoning applies in reference to a corporation engaged solely in foreign commerce. United States Const. Art. 1, sec. 8. A State statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and is invalid regardless of the purpose for which it was enacted. *Schafer* v. *Farmers Grain Co.* 268 U.S. 189, and cases cited.

"The exceptions of debts and contracts which relate to interstate commerce, made by the statute, does not necessarily except also such debts and contracts as relate to foreign commerce. Congress by its legislation has swept into interstate commerce many transactions which have only an incidental relation thereto; but which, by the exercise of that legislative power have been made part of interstate commerce, and, thereby, have been placed beyond the control of State legislation. It has not so dealt with foreign commerce, and until it acts, there is still opportunity for valid action by the State Legislature.

"Had the Supreme Court of the United States decided that such transactions formed part of foreign commerce, or were so directly connected with it that any State legislation necessarily burdened or interfered with it, of course we should acquiesce."

In *Baltic Mining Company* v. *Massachusetts*, 231 U.S. 68, 83, affirming 207 Mass. 381, 212 Mass. 35, this Court said:

"It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed, in part at least, in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained."

* * * * *

At p. 84.

"Construing the act in question, the Supreme Judicial Court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc. business, which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation."

Western Union Tel. Co. v. *Kansas, ex rel, Coleman*, 216 U.S. 1.

Pullman Company v. *Kansas, ex rel, Coleman*, 216 U.S. 56.

See *McCall* v. *California*, 136 U.S. 104; and *Crutcher* v. *Kentucky*, 141 U.S. 47, involving state statutes which were held unconstitutional as being repugnant to Clause 3, Section 8, Article 1 of the Constitution of the United States, commonly known as the Commerce Clause.

We desire also to refer to the language which this Court used in the case of *Beer Co.* v. *Massachusetts*, 97 U.S. 25, in which it was said that the question as to the paramount authority of the Constitution and laws of the United States relating to the regulation of commerce with foreign nations and among the several states, or otherwise, did not arise.

The legislative action of the states must not be arbitrary or unreasonable when considered upon the ground of its effect upon the Constitution and the laws of the United States.

See C.R.I. & P. Ry. v. *Perry*, 259 U.S. 548.
General Ry. Signal Co. v. *Virginia*, 246 U.S. 500.
Fort Smith Light Co. v. *Paving District*, 274 U.S. 387.

The following quotation is from the decision of this Court in *Truax* v. *Corrigan*, 257 U.S. 312, 329;

> "This doctrine is supposed to find support in the case of *N.Y.C.R.R. Co.* v. *White*, 243 U.S. 188, 198; Ann. Cas. 1917D, 629; 13 N.C.C.A. 943, and cases there cited. These cases, all of them, relate to the liabilities of employers to employees growing out of the relation of employment for injuries received in the course of employment. They concern legislation as to the incidents of that relation. They affirm the power of the state to vary the rules of common law as to the fellow-servant doctrine, assumption of risk, and negligence in that relation. They hold that employers have no vested right in

those rules of the common law. . . . It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

In the case of *Hayes Wheel Co.* v. *American Dist. Co.*, 257 Fed. 881, 259 U.S. 62, certiorari denied, which upheld the constitutionality of a Michigan statute imposing a franchise tax on foreign corporations, Section 8 of which excluded sales which would be protected by the rights of interstate commerce, that Court said:

"The Supreme Court of Michigan has construed the statute as making unenforceable a contract made before compliance with the statute. This declaration of invalidity must be recognized by the courts, state or federal in whatever state suit may be brought for its enforcement. . . . applying these principles concretely, the statute is bad if it attempts to impose a tax upon all plaintiff's capital, whether employed in state or interstate commerce or if it assumes to impose a license or franchise fee upon business done in the state without distinction between state and interstate business.

"On the other hand, the authority of the state to restrict the right of plaintiff corporation to engage in business within its limits, or to sue in its courts, so long

as interstate commerce is not thereby burdened, is well settled; . . . and the mere fact that plaintiff is engaged in interstate commerce does not exempt its property from state taxation . . . and the state business is thus capable of separation from the interstate."

See International Paper Co. v. *Massachusetts*, 246 U.S. 135, 144.

It will thus be seen that the decisions of this Court have held certain state laws as constitutional which are in the nature of tax laws, and other state laws as unconstitutional, upon the ground as to whether or not the said laws were repugnant to the commerce clause of the Constitution of the United States. These cases and there are, of course, many other similar cases that might be referred to here, have some bearing upon the questions for review by this Court in the instant case. There is, however, a difference which is easily distinguishable in that laws which are applicable to foreign corporations in connection with the doing of business in a particular state are based upon the value of the property, or the income from the business of such corporations which is wholly confined to intrastate commerce, while under the provisions of the Workmen's Compensation Act of Massachusetts, which requires all employers to carry insurance with private insurance companies, the separation of the employees of a railroad company engaged in both interstate and intrastate commerce in Massachusetts *must separate, for the purposes of insuring, all of its employees who are not engaged in interstate commerce.*

In this connection the following language is quoted from the decision in *Smith, et al* v. *Illinois Commerce Commission*, 282 U.S. 133, 149.

"In view of the questions presented in this case, the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the rates prescribed."

The vital question before the Supreme Court of Massachusetts in the decision of the Armburg case was whether or not the provisions of the Workmen's Compensation Act were applicable to employees of railroad companies injured within the scope of their employment while engaged wholly in intrastate commerce and the decision of this court in the case of *Second Employers' Liability Cases,* 223 U.S. 1, involved the same principle as to the constitutionality of the act of Congress relating to railroad employees engaged in interstate commerce. The following language in the last mentioned decision at p. 51 is here quoted:

"The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, *rather than its effect upon interstate commerce,* (italics ours) as the criterion of congressional power.

* * * * *

"The present act, unlike the one condemned in Employers' Liability Cases (Howard v. Illinois C.R. Co.) 207 U.S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *deals*

only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce." (Italics ours.)

At p. 54, quoting from *Smith* v. *Alabama*, 124 U.S. 465, 473,

"It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

* * * * *

At p. 55.

"The inaction of Congress, however, in no wise affected its power over the subject."

* * * * *

At p. 56.

"And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

* * * * *

At p. 58.

"It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by the Chief Justice Taney, in the case of Ableman v. Booth, 21 How. 506, 16 L. ed. 169; and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved."

In *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 392, this Court said:

> "The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be depleted therefrom by local statutes or local views of common law rules.
>
> * * * * *
>
> "There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution."

In *Sonsmith* v. *Pere Marquette R.R.*, 173 Mich. 57, at p. 73, the Court said:

> "The Federal statute of 1906 . . . applied to every common carrier engaged in interstate commerce . . . and the first section of the act was not otherwise unlike the present section of the Michigan statute. By a divided court it was held in 207 U.S. 463 that it was unconstitutional as applied to commerce among the several states, because providing that in such service the common carrier should be liable to any of its employees. The act was construed by the majority of the judges to mean *any employee*, whether employed in interstate or intrastate business of the corporation.

At p. 88.

> "It will be noted that the statute of South Dakota applies to every common carrier and to all employees of common carriers, as did the Federal act of 1906, while the Michigan statute applies to a single class of common carriers, namely, railroads. Much that is said in argument in the opinion in the *Westby* case, in con-

demnation of the South Dakota law, sustains the classification made in the Michigan law."

There have been numerous decisions of this Court in regard to state laws covering injuries to railroad employees only in which the constitutionality of same have been upheld in this Court.

C.B. & Q. Ry. v. *McGuire,* 219 U.S. 549.
Missouri Pacific Ry. Co. v. *Castle,* 224 U.S. 541.
M.J. & K.C.R.R. v. *Turnispeed,* 219 U.S. 35.
C.I. & L. Ry. v. *Hackett,* 228 U.S. 559.

The general principle of the modification of the common law rights and liabilities of employers and employees of railroads has been involved in state legislation for many years and such legislation, we believe, when incorporated within the provisions of the Workmen's Compensation Acts must be considered upon a different ground than special legislation by the states outside of Workmen's Compensation Acts. The cases cited above are in relation to special legislation of this nature, while the case of *N.Y.C.R.R. Co.* v. *White,* 243 U.S. 188, affirming 216 N.Y. 653, is a sample of a state Workmen's Compensation Act which removes the common law defenses of employers who fail to secure the payment of compensation.

The Workmen's Compensation Act of 1910, Ch. 674, of New York, was held unconstitutional in 201 N.Y. 271 because in conflict with the due process of law provisions of the State Constitution and of the 14th amendment. The 1914 act was held not in violation of the 14th Amendment, and in the decision of this Court it was said at p. 209:

"No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its payroll (about fifty-

seven million annually); hence no criterion of the practical effect of the third class is suggested."

This Act was held as elective and in the case of *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, which held the Washington Workmen's Compensation Act of 1911 constitutional, this Court said:

> "However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in *N.Y.C.R.R. Co.* v. *White*, decided this day. It is true that in the Washington act the state fund is the sole source from which the compensation shall be paid, whereas the New York act gives to the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance company, or by a deposit of securities with the State Commission. But we find here no ground for a distinction unfavorable to the Washington law."

And in the dissenting opinion by Justice McKenna in *Arizona Employers' Liability Cases*, 250 U.S. 400, 437, it was said:

> "In the New York compensation law passed on in *N.Y.C.R.R. Co.* v. *White*, 243 U.S. 188, there were 42 groups of hazardous occupations. In *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, the court had quite a struggle with the provisions of the Workmen's Compensation law, which was so far different from those of the other cases as to incur the dissent of members of the court."

At this point we desire to stress the fundamental differences that naturally exist between workmen's compensation acts of a compulsory form as contrasted to the elec-

tive form, and we believe the language used in the case of *Sheehan Pipe Line Construction Co.* v. *State Industrial Commission* (Okla.) 3 P. 2d, 199, is quite appropriate:

> "A well-reasoned opinion is found in the case of *North Alaska Salmon Co.* v. *Pillsbury,* 174 Cal. 1. . . . There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911, and various statutes in other states, under which the compensation provisions are dependent upon the election or consent of the employer and the employee. . . . Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract. Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrongdoing on the part of the person charged."

In the decisions of this Court where the provisions of Workmen's Compensation Acts of various states have been reviewed, they have been held not a violation of the provisions of the Constitution of the United States upon other than the commerce clause, and have been held by this Court to be elective rather than compulsory in regard to the provisions of the employer to come within the terms of the Act. In *Jones' Digest of Workmen's Compensation Laws in United States and Territories, with Annotations, Twelfth Edition, December 1, 1931,* it is interesting to note on page IX under the head "Insurance or Other Securities" that among the seven states classified under the head of "Insurance Compulsory," the Massachusetts Act is included.

We contend that this is as it should be, notwithstanding the fact that in decisions of the Supreme Judicial Court of Massachusetts the Massachusetts Act has been held elective; and that this Court is not bound by this construction,

having been placed thereon by that Court for the reasons as set forth herein on page one of this brief.

In the case of *Hawkins* v. *Bleakly*, 243 U.S. 210, affirming 220 Fed. 378, which was a bill in Equity to restrain enforcement of the provisions of the *Iowa* Workmen's Compensation Act, it is recognized that this Court used the following language.

> "As to private employers, it is an elective workmen's compensation law, having the same general features found in the recent legislation of many of the states, sustained by their courts. (Citations.) And acceptance of the terms of the act being presumed unless employer or employee gives notice of an election to reject them. *To this main purpose no constitutional objection is raised, the attack being confined to particular provisions of the law.* (Italics ours.)
>
> "Some of appellant's objections are based upon the ground that the employer is subjected to a species of duress in order to compel him to accept the compensation features of the act; . . . But it is clear, as we have pointed out in *N.Y.C.R.R. Co.* v. *White*, decided this day, that the employer has no vested right to have these so-called common law defenses perpetuated for his benefit, and that the 14th Amendment does not prevent a state from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to."

But the petitioner herein attacks the validity of the Massachusetts Workmen's Compensation Act as affecting railroads engaged in interstate and intrastate commerce upon the ground that same is in violation of the commerce clause of the Constitution of the United States, which has not been

urged in the consideration of any other Workmen's Compensation Act by this Court up to the present time.

In the Armburg opinion at pp. 1756, 1757, the court said:

> "It is often a question of difficulty whether a particular injury arose out of intrastate or interstate commerce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business. There are differences in certain instances as to the persons entitled to recovery and the persons to whom the amount recovered may ultimately be payable under the Federal employers' liability act and under the workmen's compensation act. These and other differences appear to us to constitute merely difficulties of a kind not infrequently encountered in the practical administration of affairs, but not to amount to insurmountable obstacles in the way of construing the scope of the statute according to its words and purpose.
>
> "The same employees may be engaged alternately during stated periods in intrastate and in interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required."

It is our contention that the language of the act under consideration is more consistent with the terms of the Workmen's Compensation Act of a compulsory rather than of an elective nature and this opinion is further confirmed by a consideration of the provisions of the Act so far as employers are concerned. It will be admitted that

the only election under this Act on the part of employees can only be exercised after the employer has become an insurer under the Act; therefore, if elective, the election, or option, is in the employer only.

The original Act of 1911, Chapter 751, Part IV was entitled "Massachusetts Employees Insurance Association" and General Laws, Acts of 1915, Ch. 287, was entitled "An Act Providing That Workmen's Compensation Insurance Policies shall be subject to Approval by the Insurance Commissioner";

Acts of 1916, Chapter 200, "An Act relative to Workmen's Compensation and Liability Insurance." Sec. 1. Any mutual liability company authorized to do business in this Commonwealth may, with the approval of the insurance commissioner, have and exercise any or all of the rights, powers and privileges relating to the transaction of the business of workmen's compensation insurance by law vested in or conferred upon the Massachusetts Employees Insurance Association."

Acts of 1931, Ch. 426, Sec. 251:

> (6) "Insured or Insured persons" an employer who has provided insurance for the payment to his employees by an insurer of the compensation provided by this chapter."
>
> Sec. 252, 1 (7) "Insurer" any insurance company authorized so to do which has contracted with an employer to pay the compensation provided for by this chapter."

From which it will be seen that the insurance requirements as affecting employers is confined to private mutual insurance companies doing business in Massachusetts, and that there is no state fund to which employers can contribute as in the case of *Middleton* v. *Texas Power & Light*

Co., 249 U.S. 152, confirming 108 Texas 96, and consequently we contend that a railroad company engaged in interstate and intrastate commerce cannot be denied its common law defenses in actions by employees while engaged at the time of the accident in intrastate commerce because of its failure to become an insurer under the provisions of the Massachusetts Workmen's Compensation Act.

In the Armburg opinion at p. 1754, the court said:

> "If it had been the intent of the Legislature to exclude railroads engaged in interstate commerce from the operation of the act, it would have been a simple matter to state that intent in unequivocal language. The words, purpose, and legislative history of the act as now phrased require the conclusion that it was intended to be applicable to all classes of injuries therein described within the competency of the legislative department."

In most all the compensation acts of the various states a provision is made for a written notice to be filed by the employer to the effect that it has elected to come within the provisions of the Act or that an election is presumed by the employer, but in nearly every such Act, railroads engaged in interstate commerce are specially excepted and in the case of Minnesota, North Carolina, North Dakota, Texas, Virginia and Washington, all employees of railroads are excepted.

By Acts of 1913, Chapter 568, the Massachusetts Workmen's Compensation Act was amended by inserting the clause "Except masters of and seamen on vessels engaged in interstate or foreign commerce. See Section 1 (Clause 4) of General Laws, Chapter 152."

See *Morrison* v. *Commercial Towboat Co.*, 227 Mass. 237.

In the Armburg opinion at p. 1755 the court said:

"There are numerous cases where decisions of State courts have been reversed because recovery had been allowed under workmen's compensation laws when, as the United States Supreme Court held, the injury had occurred while the employee was engaged in interstate commerce and where, therefore, the State laws were inapplicable and the Federal employers' liability act governed the rights and liabilities of the parties. *New York Central Railroad Co.* v. *Winfield*, 244 U.S. 147. *New York Central Railroad Co.* v. *Porter*, 249 U.S. 168. *Southern Pacific Co.* v. *Industrial Accident Commission*, 251 U.S. 259. See, also, *American Railroad Co.* v. *Birch*, 224 U.S. 547. It does not appear to have been suggested in any of these decisions that railroad corporations were not subject to State workmen's compensation acts as to their intrastate business."

Gillard's Case, 244 Mass. 47, 51.

General Railway Signal Co. v. *Virginia*, 246 U.S. 500.

Fort Smith Light Co. v. *Paving District*, 274 U.S. 387.

C.R.I. & P. Ry. Co. v. *Perry*, 259 U.S. 548, 556.

We believe that the same necessity which required the exception in the case of seamen engaged in interstate and foreign commerce attaches to employees of railroad companies engaged in interstate commerce, as the exclusive jurisdiction in congressional legislation is as broad in each class, and the failure to except railroad employees engaged in interstate commerce is wholly arbitrary and unreasonable.

In *Keaney's Case*, 217 Mass. 5, 8, which related to insurance covering farm laborers which are excepted under Section 67 of said Act, the Supreme Judicial Court of Massachusetts said as follows:

> "On the other hand, if he does not desire to make it available for all of his employees, there is no insuperable objection to his undertaking an insurance for a limited portion of them."

and in the Armburg opinion at p. 1756,

> "The act does not require, and the decision in the *Cox* case does not mean, that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court."

The difficulties (including expenses of trial) of determining whether a railroad employee was engaged in interstate commerce are well known and it cannot be denied that the great majority of railroad employees are most of the time engaged in interstate commerce and that the employees of

other than carriers by railroad are never so engaged, which is the reason undoubtedly that most workmen's compensation acts do make an exception of railroad employees.

As the Massachusetts Act does not except employees engaged in interstate commerce there is no question but that railroad companies in Massachusetts engaged in interstate commerce may be liable under the provisions of other statutes affecting railroads if the provisions of the Workmen's Compensation Act are held applicable to such railroads. In the decision in the Armburg case, Advance Sheets 1931, at p. 1758, the Court said:

"The liability established by said Section 3 is punitive in nature; the penalty is to be assessed solely to the degree of culpability of the defendant, or its agents or servants, and it co-exists now as always hitherto with the liability for death established by the Employers' Liability Act. G.L.c. 229, secs. 4, 7, 8, 9, 10. G.L.c. 153. The measure of damages and the basis of liability are different under said Section 3 and under said Section 9." Sections 3 and 9 are of G.L.c. 229, covering the penalty for causing death of an employee are as follows:

> "Section 3. If a corporation operating a railroad, street railway or electric railroad, by reason of its negligence or of the unfitness or negligence of its agents or servants while engaged in its business, caused the death of a passenger, or of a person in the exercise of due care who is not a passenger or in the employment of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars, to be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, which shall be paid to the executor or administrator, and distributed as provided in section one; but

a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation, and one which operates an electric railroad shall not be so liable for the death of a person while so walking or being on that part of its railroad not within the limits of a highway. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, which shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased, and distributed as provided in section one. If an employee of a railroad corporation, being in the exercise of due care, is killed under such circumstances as would have entitled him to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by this section."

"Section 9. If under section four or section seven damages are awarded for death or for injury and death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

"The amount of damages which may be awarded in an action brought under section seven shall not exceed five thousand dollars for both the injury and the death,

and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled under section four to bring an action for his death." (See Acts 1927, Ch. 213.)

In *Hix* v. *N.Y.C.R.R. Co.*, 230 Mass. 309, which was for an action to recover for death of an employee under statute which is now G.L.c. 229, Sec. 3, at p. 312 the Court said:

> "The defendant railroad company was not a subscriber under the workmen's compensation act, St. 1911, c. 751; and it is argued by the plaintiff that the company is deprived of the defences of contributory negligence and assumption of risk on the part of the intestate, by virtue of the provisions of Part I, Sec. 1 of the act. On the other hand, the defendant contends that the railroad death statute, under which this action is brought, is not affected by the provisions in the workmen's compensation act dealing with the death of employees. Assuming, without deciding, that the defendant's contention is correct, nevertheless in this case there was ample evidence of the intestate's due care."

In *Oulighan* v. *Butler,* 189 Mass. 287, 295, it is said:

> "Although the plaintiffs rightly were allowed to go to the jury upon both issues, these grounds of liability have been held distinct in statutory actions against corporations operating railroads and railways for loss of life of one not being a passenger."

And in "*The Linseed King*" 48 F. 2d, 311, 316, the following language is used:

> "Of course, where employees of common carriers by railroad are injured or killed while engaged in interstate commerce, Congress has covered the entire field by the enactment of the Federal Employers' Act (45

U.S.C.A. s. 51-59), and state workmen's compensation statutes are excluded. *New York Central R. Co.* v. *Winfield*, 244 U.S. 147."

The Supreme Judicial Court of Massachusetts has said "It is thus seen, that, after the passage of the general act as to the liability of carriers in 1840 the Legislature enacted special statutes applicable to railroad corporations, which were inconsistent with the general act. *The Legislature could not have intended that railroad corporations should be liable under two inconsistent statutes covering the same subject.* (Italics ours.) The effect therefore of the latter special legislation was to repeal so much of the statute of 1840 as applied to railroad corporations, or, in other words, to take railroad corporations out of the operation of the earlier statute."

It is our contention, therefore, that the construction placed upon the provisions of Chapter 152, by the Supreme Court of Massachusetts, to the effect that railroads engaged in both interstate and intrastate commerce are amenable thereto, should not be accepted by this Court; and that in line with the general trend of similar legislation by other states and territories of the United States that it is more reasonable to except railroad companies engaged in either interstate or intrastate commerce, or both, as has been done by other states.

G. L. Ch. 152, Workmen's Compensation Act of Massachusetts:

"Section 53. Any mutual liability insurance company authorized to do business in this commonwealth may with the approval of the commissioner of insurance distribute its risks into groups in accordance with the nature of the business and the degree of the liability of injury and with like approval fix by and for such

groups in accordance with the experience of each group all premiums, assessments and dividends; but all the funds of the company both actual and contingent shall be available for the payment of any claim against the company.

"Section 54. Policies of workmen's compensation insurance issued or delivered in the commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by this chapter, whatever other contingencies may be insured by riders attached thereto or endorsements thereon. On the face of such policies shall be printed conspicuously the words: 'Insurance under this policy is in Class of the company's Workmen's Compensation Classification Manual,' and in the blank thus provided the number or other designation in said manual under which the said policy is written shall be placed before the policy is issued."

In the Armburg opinion at p. 1760, the Court said:

"If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in interstate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce."

If it were within the range of human possibility to classify the employees of railroad companies engaged in both interstate and intrastate commerce for the purpose of securing the compensation for injuries as required by insurance

companies under the provisions of the Workmen's Compensation Act, it cannot be denied that the payment of premiums for such insurance would not avoid the payment of damages recovered in a suit under the provisions of the statutes of other states than those of Massachusetts, and in the case of the petitioner and other railroad companies with railroad employees engaged at piers and docks in connection with the handling of its business, the laws governing the rights of the parties would be exclusive of any state statute in most cases of injuries to its employees.

> "One purpose of the Workmen's Compensation Act was to *expedite relief* (Italics ours) to the employee and ascertainment of liability of insurer and to avoid the delay and expense of ordinary litigation to both the employee and others. That purpose would have been defeated by leaving to the employee the unrestrained option to pursue his common-law remedies against third persons and resort to the relief afforded by the Workmen's Compensation Act only in the event of defeat."
>
> * * * * *
>
> "In this context it means that the employee cannot institute proceedings both at common law against the third person and under the Workmen's Compensation Act against the insurer. He must make a binding election. Resort to either form of relief constitutes such binding and final election, and he cannot thereafter pursue the other. It is not the usual case of election of remedies under doctrines of the common-law; it is an election under the provisions of a statute which specifies the conditions and terms of election."

Tocci's Case, 269 Mass. 221.

Also see

Ahearn's Case, 247 Mass. 512.

O'Hara's Case, 248 Mass. 31.

Bradford Electric Light Co. Inc. v. *Clapper*, 76 L. ed. 161.

McLaughlin's Case, Mass. Adv. Sheets, 1931, p. 243.

"In several instances jurisdiction under the Workmen's Compensation Act over an injury which might have been argued to be maritime in its nature was without the point being raised, discussed or thought of. Yet it is familiar law that a statute which would be unconstitutional as applied to a certain class of cases and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the legislature. *Atty. Gen.* v. *Electric Storage Battery Co.*, 188 Mass. 239, 241; *Manchester* v. *Popkin*, 237 Mass. 434, 440; *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 220. The workmen's compensation act, therefore, must be and is interpreted as intended only to operate upon the classes of employment and injury within the jurisdiction of the General Court." . . . "Thus it is wholly optional with both the employer and the employee whether to become subject to the act or to stay out of it. Each has an absolute choice to act according to his own conceptions of his interests. Only when both concur in accepting it, does the act become operative."

Gillard's Case, 244 Mass. 47, 51-54.

See *Toland's Case*, 258 Mass. 470, 472-473.

In *Young* v. *Duncan*, 218 Mass. 346, at p. 349:

"The purpose of this act has been stated several times. Briefly, it was to substitute a method of accident insurance in place of the common law rights and liabilities for substantially all employees except domestic servants, farm laborers and masters of and seamen on vessels engaged in interstate or foreign commerce, and those whose employment is casual or not in the usual course of trade, business or employment of the employer, *and probably those subject to the federal employers' liability act.*" (Italics ours.)

and at p. 353: "The employee is not compelled to give up any common law or constitutional right. It is a matter of choice whether he avails himself of the one or the other. Reasonable provisions are made for the exercise of his election. *Foster* v. *Morse*, 132 Mass. 354.

The section is not open to objection as class legislation, or as denying equal protection of the laws. It applies to all employees alike. In this respect it is no more vulnerable than the employers' liability act, which establishes remedies for the benefit of employees, the weekly payment law or many other acts of like nature. *Opinion of the Justices*, 163 Mass. 589. *Commonwealth* v. *Riley*, 210 Mass. 387. *Sturges & Burn Manuf. Co.* v. *Beauchamp*, 231 U.S. 320, 326, and cases cited. *Chicago, Burlington & Quincy Railroad* v. *McGuire*, 219 U.S. 549. *Mondou* v. *New York, New Haven & Hartford Railroad*, 223 U.S. 1. *German Alliance Ins. Co.* v. *Kansas*, 233 U.S. 389. *Erie Railroad* v. *Williams*, 233 U.S. 685. The act is constitutional and is not open to criticism in the respects urged by the plaintiff."

Negligence of the employer not being essential to payment of compensation under Workmen's Compensation Act

and employers not excepted who fail to provide insurance for the payment of his employees of the compensation required by the act, are not liable for injuries to an employee if there was no negligence of the employer, which places such employers in the same category as railroads engaged in interstate and foreign commerce who would obtain no benefits if such employees were insured under the act. In other words, through no fault of the latter they are in no better position than the employer who can unquestionably insure but does not.

In *N.Y.C.R.R. Co.* v. *Winfield*, 244 U.S. 147, at pp. 153 and 154:

> "Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in Prigg v. Pennsylvania, 16 Pet. 539, 617, 10 L. ed. 1060, 1089, 'if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-

matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.' Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it."

In *Erie R.R.* v. *Winfield,* 244 U.S. 170, 174, it is said:

"It is beyond the power of any state to interfere with the operation of that act, either by putting the carrier and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption."

In *C.R.I. & P. Ry.* v. *Schendel, Admr.,* 270 U.S. 611, in which there was an award under the Iowa Workmen's Compensation Act to a widow for death of an employee in Minnesota, under the Federal Employers' Liability Act, this Court held that the mere fact that the decision had been filed by a deputy industrial commissioner in a proceeding under the Iowa Compensation Act did not prevent an entry of judgment in the Minnesota action. The Iowa Workmen's Compensation Act is elective in form and as said in *Booth Fisheries Co.* v. *Industrial Commission of the State of Wisconsin,* 271 U.S. 208:

"A complete answer to this question is found in the elective or voluntary character of the Wisconsin Compensation Act."

It is our contention that although the Supreme Judicial Court of Massachusetts had defined the Massachusetts Act as elective in form, no election can be presumed or attached to a railroad company engaged in interstate and intrastate commerce, due to its failure to become an insurer under the Act for the reasons as set forth herein and, therefore, there can be no mutual consent between the employer and the employee to come within the terms of the Compensation Act as is necessary.

See *Gillard's Case,* 244 Mass. 47, 51.

Holcomb v. *Creamer,* 241 Mass. 99, 109-110.

> "If the Act is in fact compulsory in form there can be no question of contractual release which is applicable only to the elective form. We contend "The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer. . . . It therefore undertakes to solve but one half of the problem."

Adkins v. *Children's Hospital,* 261 U.S. 525.

The requirements of General Laws, Chapter 152, are different in form to other similar acts upon which this Court has been called upon to review in that although the 1911 Act provided for an Employees Insurance Association, insurance is by private mutual companies who are authorized to handle workmen's compensation; that as no state fund has ever been provided or any writing is required on the part of an employer accepting the provisions of the Act or securing liability; and that in most all of such acts that railroads engaged in interstate commerce have been specifically exempted; that we strongly urge this Court to reverse the judgment of the court below upon the grounds that to make the provisions of said Act applicable to the

petitioner and other railroad corporations engaged in interstate and intrastate commerce in Massachusetts amounts to an undue burden upon commerce between states and is, therefore, a violation of the Constitution of the United States in that respect.

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SUPREME COURT OF THE UNITED STATES.

No. 477.—October Term, 1931.

Boston and Maine Railroad, Petitioner,
vs.
Fred Armburg.

On Writ of Certiorari to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts.

[March 14, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on certiorari, 284 U. S. —, to review a judgment of the Municipal Court of Boston, entered on rescript of the Supreme Judicial Court of Massachusetts, holding that the Massachusetts Workmen's Compensation Act does not impose an unconstitutional burden on interstate commerce. Mass. Adv. Sheets, 1931, p. 1751.

The suit was brought by respondent to recover for personal injuries while in the employ of petitioner, an interstate rail carrier, engaged both in intrastate and interstate commerce. At the time of his injury, he was engaged exclusively in intrastate commerce. The Railroad Company interposed as defenses that the injury was due solely to the negligence of a fellow servant and that respondent had assumed the risks of such negligence. Upon the trial by the court without a jury, respondent invoked the provisions of the Massachusetts Workmen's Compensation Act, § 66, c. 152, Mass. General Laws, providing that an employer not electing to comply with that Act by effecting the prescribed insurance for the benefit of his employes, as petitioner had failed to do, may not interpose these defenses in an action brought by an employe to recover for injuries sustained in the course of his employment. Rulings requested by the petitioner that the Act did not apply to petitioner, and if it did, that the provisions invoked, constituted an unconstitutional burden on commerce, were denied. The correctness of these rulings was reviewed and upheld by the Supreme Judicial Court, after which, following the Massachusetts practice, judgment was entered accordingly by the Municipal Court.

It is the contention of the petitioner that the insurance provisions of the Massachusetts Act, if applied to an interstate carrier, impose an unconstitutional burden on interstate commerce, and as § 66, denying to employers certain common law defenses, in effect penalizes failure to comply with the insurance provisions, and is inseparable from them, the constitutionality of the section is conditioned upon that of the insurance requirements and must be deemed unconstitutional as applied to petitioner. See *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583.

The Act, in terms, § 1 (4), is made broadly applicable to employes "except masters of and seamen on vessels engaged in interstate or foreign commerce", and the state court held in this case that it is applicable to the employes of interstate carriers engaged in intrastate commerce. But construing the act, it ruled that as by implication all statutes of the state are intended to operate only upon a subject within the jurisdiction of the legislature enacting them, this statute is not to be deemed to be applicable to employes whose rights of recovery for injuries in the course of their employment in interstate commerce are governed by the Federal Employers' Liability Act. The Court said (p. —):

"' . . . The act does not require . . . that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court."

Thus construed the Act does not on its face impose any burden on interstate commerce.

The enactment of workmen's compensation acts is within the legislative power of the state, *Mountain Timber Co.* v. *Washington*,

243 U. S. 219, 238, 239; *Madera Sugar Pine Co.* v. *Industrial Accident Commission,* 262 U. S. 499, 501, 502, which includes the power to do away with the fellow servant and assumption of risk rules. *New York Central R. R. Co.* v. *White,* 243 U. S. 188, 200; *Hawkins* v. *Bleakly,* 243 U. S. 210, 213; *Missouri Pacific R. R. Co.* v. *Mackey,* 127 U. S. 205; *Minnesota Iron Co.* v. *Kline,* 199 U. S. 593. The interstate commerce clause did not withdraw from the states the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it. *Sherlock* v. *Alling,* 93 U. S. 99, 103; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 26; *Interstate Busses Corp.* v. *Holyoke St. Ry. Co.,* 273 U. S. 45, 52; *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Solan,* 169 U. S. 133, 137, 138.

Although by the Federal Employers' Liability Act the regulatory power of the national government over interstate commerce has been extended to the employes of interstate rail carriers, it has not excluded the exertion of state power over their employes while engaged in a service not involving interstate commerce. See *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.,* 239 U. S. 556, 558. The liability of the carrier to its employes when so engaged is controlled by state law, see *Illinois Central R. R. Co.* v. *Behrens,* 233 U. S. 473; *Wabash R. R. Co.* v. *Hayes,* 234 U. S. 86, 89, 90; and thus remains within the scope of state legislative power to regulate the relations of master and servant. *Chicago & Eastern Illinois R. R. Co.* v. *Industrial Commission of Illinois,* 284 U. S. 296.

But the petitioner insists that the Massachusetts statute does invade the field already occupied by the federal legislation. It is said that the statute, as construed by the state court, applies to all employes in intrastate commerce, while the federal act does extend to and include some employes engaged in intrastate commerce if, at the same moment and in the same service, they are also engaged in interstate commerce. See *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.,* 229 U. S. 146; *Erie R. R.* v. *Winfield,* 244 U. S. 170; *Southern Pacific Co.* v. *Industrial Accident Commission,* 251 U. S. 259.

But there are two answers to this suggestion First, as was conceded at the trial, the respondent was not engaged in interstate commerce at the time of the accident, and the petitioner cannot

object, on the ground advanced, to the application of the Act to his employment. Second, we do not read the opinion of the state court as placing any such construction on the Act. By the language which we have quoted and elsewhere in the opinion, the court states with emphasis that the Act is not to be construed as reaching into any part of the field occupied by federal legislation. Thus construed, it does not purport to extend to employes who, because they are engaged in interstate commerce, are within the federal act, even though at the same time their service is also in intrastate commerce.

Petitioner also urges that as the insurance provisions of the Act, as interpreted by the state court, require the premiums to be based on so much of its payroll as may be allocated to the hours of employment in intrastate commerce, a burden is imposed on interstate commerce by the difficulty, if not impossibility, of making the allocation. So far as this argument is based on an interpretation of the statute which the state court has rejected, it may be disregarded. The allocation required is only to employment exclusively in intrastate service not embraced in the Federal Employers' Liability Act. The state court thought that possible difficulties in making it could be dealt with administratively by rules framed by the State Insurance Commissioner, acting under authority of the Act. In any case, it is not self-evident that the Act is unworkable, and there is nothing on the record which would enable us to say that such allocation is either impossible or so difficult as necessarily to impose any burden on interstate commerce. See *Interstate Busses Corporation* v. *Holyoke St. Ry. Co., supra,* p. 52.

There are no findings and the petitioner asked no ruling with respect to the point. There is no evidence from which it could be inferred that the allocation could not be made or that insurance could not be effected at a cost bearing a fair relation to the intrastate service to which the Act applies. The burden was on petitioner, who assailed the statute, to establish its unconstitutionality. *O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co.,* 282 U. S. 251; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden,* 284 U. S. 151, 158. For the same reasons we need not discuss like objections based on the Federal Safety Appliances Act.

Affirmed.